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THE UNIVERSITY OF MISSOURI BULLETIN

VOLUME 18. NUMBER 34

(LAW SERIES 16

MANLEY O. HUDSON, EDITOR

EQUITABLE SERVITUDES IN MISSOURI

(GEORGE L. CLARK
Professor of Law

NOTES ON RECENT MISSOURI CASES

INDEX TO LAW SERIES 1-16



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Number Sixteen

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THE UNIVERSITY OF MISSOURI BULLETIN

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LAW SERIES 9

PRELIMINARY STOCK SUBSCRIPTION AGREEMENTS IN MISSOURI

By MANLEY O. HUDSON
Professor of Law

NOTES ON RECENT MISSOURI CASES



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PRELIMINARY STOCK SUBSCRIPTION AGREEMENTS IN MISSOURI

I INTRODUCTION

A city community is infested with smoke from a railroad switching yard nearby. It is proposed that the people living in the vicinity should organize a corporation to purchase the land used for switching purposes and to convert it into a restricted residence district. All of the residents and property owners in the neighborhood would benefit if such a proposal were consummated and the support of a large number of them would be necessary for its success. To be assured of their co-operation, promoters induce a number of them to sign a preliminary agreement in which it is stated that each signer subscribes for a certain number of shares in the corporation to be formed, and that the signers appoint a committee to purchase the land and convey it to the corporation which they shall cause to be organized. Does the signer of such a paper incur any obligation to take the shares as agreed? If so, what is the nature of the obligation, who is the proper party to enforce it, and from what time is the signer bound thereby?

As simple as these questions seem to be, in Missouri as in many other jurisdictions they cannot be readily answered as a result of the decisions. The case stated is substantially that of *DeGiverville Land Co. v. Thompson*¹ in which the recent decision of the St. Louis Court of Appeals marks an advance over previous decisions of the Missouri courts.

Preliminary stock subscription agreements are no longer in general use. In the early part of the last century they were a popular means of organizing corporations, but the more modern general statutes of incorporation which now exist in all of the states have made it less convenient to resort to such methods of organization.² In some instances they are still necessary, how-

1. (1915) 190 Mo. App. 682, 176 S. W. 409.

2. Conyngton, *Corporate Organization*, p. 23.

ever. Whenever the organization of a quasi-public or co-operative undertaking is contemplated they are not only convenient, but almost indispensable. If, for instance, it were proposed to build a railroad from Columbia to Jefferson City for which the capital were not available, it would be necessary to resort to some such method of enlisting co-operation. Milk condensing companies are frequently organized in this way.

A business agreement such as that under consideration should be approached with a desire to find it susceptible of being interpreted in such a way that it can be given legal support.³ We are not dealing with a voluntary subscription to a charitable enterprise in the success of which the subscribers have no pecuniary interest. It is more than a gratuitous undertaking of each subscriber to take a certain portion of the stock, and if it is clear that the prospective shareholders intended to be bound some basis should be found for holding them. But the agreement must stand analysis according to ordinary principles of the law of contracts—the situation is not unique, except that the questions which usually arise have to do with the rights of the corporation which comes into being after the transaction is completed.

II CORPORATION MEMBERSHIP IN GENERAL

Membership in a corporation must be the result either of statute or of contract.⁴ A corporation must have some membership at the time of its birth, and therefore some statutory designation is necessary in every case. A person may be made a member of a public corporation with or without his assent, for such corporations are agencies of government; but one can be made a member of a private corporation only with his assent⁵ and such

3. "It is the policy of the law to interpret a business agreement in the sense which will give it a legal support." Holmes, J., in *Martin v. Meles* (1901) 179 Mass. 114, 60 N. E. 397. Cf. *Twin Creek & Colemansville Turnpike Co. v. Lancaster* (1881) 79 Ky. 552; *Bullock v. Falmouth & Chipman Hall Turnpike Road Co.* (1887) 85 Ky. 184, 3 S. W. 129.

4. 1 Lindley, *Companies* (6th ed.) p. 12.

5. *Morrison v. Morey* (1898) 146 Mo. 543, 48 S. W. 629; *Ellis v. Marshall* (1807) 2 Mass. 269, 3 Am. Dec. 49; *Hampshire v. Franklin* (1819) 16 Mass. 76; *Richmond Factory Assn. v. Clarke* (1873) 61

assent must continue during the time of the statute's operation unless it has previously been expressed in such a way as to be irrevocable.⁶ The statute may designate any assenting person as a member of the corporation which is brought into being under its provisions. The public policy which demands that corporations should have substantial and responsible membership at the time of their birth appeals only to the legislature which enacts the statute. It is competent for a legislature to endow a corporation with any sort of statutory membership and in return to impose on its members any sort of statutory obligations. Such obligations are not consensual in any real sense and no initial contract is necessary for their creation, tho it is common to speak of the obligations *inter se* of shareholders and incorporators as contractual. The statute may confine corporation membership to those who sign articles of association,⁷ or it may include signers of preliminary subscriptions not incorporated into the articles of association.⁸ In any case the statutory designation by the state becomes the law of association of members of the corporation and common law rules as to contracts do not apply; but unless it is expressly provided that the corporation endowed with statutory membership should have no power to enter into common law contracts of membership it would seem that any corporation may proceed to enter into contracts by which new membership is created.

Prior to its organization, of course, the corporation may not enter into any contract of membership,⁹ but if persons see fit to do so they may contract for its benefit and the corporation should stand as any other beneficiary when it comes into existence. This involves an extension of the law as to beneficiary contracts to

Maine 351. In *Kirkwood Gymnasium Assn. v. Van Ness* (1895) 61 Mo. App. 361, it is not clear that one of the alleged incorporators assented, but the point was not well considered.

6. *Kidwelly Canal Co. v. Raby* (1816) 2 Price 93; 1 Lindley, Partnership (4th ed.) p. 127.

7. *Troy & Boston R. R. v. Tibbits* (1854) 18 Barb. 297.

8. A Michigan statute was so interpreted in *Peninsular Ry. Co. v. Duncan* (1873) 28 Mich. 130.

9. "A non-existing corporation can no more make a contract for the sale of its stock than an unbegotten child can make a contract for the purchase of it." *Bryant Pond Steam Mill Co. v. Felt* (1895) 87 Maine 234, 32 Atl. 888.

cases where the beneficiary is not in existence at the time of contracting, but no reason is perceived why such extension should not be made tho the cases outside the field of corporations may not yet have gone so far.¹⁰ A corporation may by novation become a party to a contract made by its promoters prior to its organization if the other party to the contract has assented to such novation. Strict ratification or adoption of such contracts is impossible because of the non-existence of the corporation at the time of contracting,¹¹ and the corporation must voluntarily assume any obligation of membership or contract made either before or after its organization.

After its organization, a corporation may contract as any other legal entity may. It may contract for any number of new memberships, except as it may be restricted by a statutory limit on its capital stock.¹² Such contracts are not required to be in any particular form, apart from statutory provisions;¹³ any expression of mutual assent is sufficient, if definite enough to be enforceable.¹⁴ The requirements as to contracting parties, offer and acceptance are not peculiar. No certificate is necessary, the certificate being merely a "muniment of title".¹⁵ No particular

10. In *Whitehead v. Burgess* (1897) 61 N. J. L. 75, 38 Atl. 802, a contract of the defendant to pay a sum of money to the owner of the first one of the foals of defendant's stallion that should trot a mile in two minutes and thirty seconds or less, was enforced. The court said that "the fact that the person to whose benefit the promise may inure is uncertain at the time it is made, and that it cannot be known until the happening of a contingency, cannot deprive the person who afterwards establishes his claim to be the beneficiary of the promise of the right to recover upon it." The plaintiff was in existence at the time of contracting, and the demurrer admitted a bilateral contract for the benefit of the plaintiff.

11. *Abbott v. Hapgood* (1889) 150 Mass. 248, 22 N. E. 907; *Pennell v. Lothrop* (1906) 191 Mass. 357, 359, 77 N. E. 842. Cf. *Joy v. Mannion* (1887) 28 Mo. App. 55.

12. On the effect of subscriptions in excess of authorized capital, see 1 Machen, Corporations, § 230; *Granger's Life & Health Ins. Co. v. Kamper* (1882) 73 Ala. 325; *Clark v. Turner* (1884) 73 Ga. 1.

13. *Nulton v. Clayton* (1880) 54 Iowa 425, 6 N. W. 685.

14. *Quaere*, whether such mutual assent had not been expressed in *Palais du Costume Co. v. Beach* (1910) 144 Mo. App. 456, 129 S. W. 270, (1911) 163 Mo. App. 499, 143 S. W. 852.

15. *Vanstone v. Goodwin* (1890) 42 Mo. App. 39. "A certificate is evidence of title to stock; it is not stock itself, nor is it necessary to the existence of stock." *Pacific National Bank v. Eaton* (1891) 141 U. S. 227, 11 Sup. Ct. Rep. 984.

shares need be allotted.¹⁶ Unless a writing is specifically required by statute, the contract may be oral.¹⁷ An actual subscription is usually unnecessary,¹⁸ and where it is required a literal "signing underneath" is not to be insisted upon.¹⁹ The name subscription contract is therefore an inapt description of membership contracts made after incorporation.

Several other kinds of agreements are frequently put in the category of subscription contracts, but improperly: contracts to subscribe for stock at a future time where some future act of subscription is contemplated,²⁰ contracts to see that other persons subscribe for stock,²¹ and contracts to purchase treasury or other issued stock.²² None of these needs to be considered in the present study.

Estoppel is frequently said to be a third road to membership in a corporation. It is, however, no more than a reason for preventing a denial of statutory or contract membership where neither is admitted to exist.²³

16. Allotment is required by statute in England. *Ward's Case* (1870) L. R. 10 Eq. 659; *Adam's Case* (1872) L. R. 13 Eq. 474. Registration is also necessary in England. 1 Lindley, *Companies* (6th ed.) p. 125.

17. *Butler University v. Scoonover* (1888) 114 Ind. 381, 16 N. E. 342; *Bullock v. Falmouth, etc. Co.* (1887) 85 Ky. 184, 3 S. W. 129; *Colfax Hotel Co. v. Lyon* (1886) 69 Iowa 683, 29 N. W. 780; *Chaffin v. Cummings* (1853) 37 Maine 76; *Wemple v. St. Louis, etc. R. R. Co.* (1887) 120 Ill. 196, 11 N. E. 906; *Shellenberger v. Patterson* (1895) 168 Pa. St. 30, 31 Atl. 943. *Contra, Fanning v. Hibernia Insurance Co.* (1881) 37 Ohio State 339; *Pittsburg, etc. R. R. Co. v. Gazzam* (1858) 32 Pa. St. 340; *Freeland v. N. J. Stone Co.* (1878) 29 N. J. Eq. 188.

18. See *Pacific National Bank v. Eaton* (1891) 141 U. S. 227, 11 Sup. Ct. Rep. 984.

19. *In re Strong* (1891) 16 N. Y. Supp. 104.

20. *Cf.* 6 Michigan Law Review 340.

21. The ordinary underwriting agreement usually provides for the underwriter's subscribing if others do not. *Cf. Colonial Trust Co. v. McMillan* (1905) 188 Mo. 547, 87 S. W. 933.

22. A sale of treasury stock involves a renovation of the original contract just as a sale by a shareholder involves a novation. *McDowell v. Lindsay* (1906) 213 Pa. 591, 63 Atl. 130. Sales of treasury stock are distinguished from original subscriptions in *Sherman v. Shaughnessy* (1910) 148 Mo. App. 679, 129 S. W. 245.

23. "Where the subscription has been acquiesced in, either by becoming a director or by attending meetings of stockholders, or by any other act indicating an acquiescence in the validity of his subscription, [a] defense based on mere technical objections will be disregarded." Napton, J., in *Kansas City Hotel Co. v. Hunt* (1874) 57

Membership in a corporation, whether statutory or contractual, usually results in an ownership of shares of stock. But membership does not always involve shareholding and statutory membership is frequently dissociated from owning shares. In some states, signers of articles of incorporation who thereby become incorporators need not become shareholders.²⁴ Where this is true and unless shareholding is not contemplated at all,²⁵ the function of the incorporators is really that of promoters²⁶ and after they have completed the organization and managed the issuance of the shares they disappear altogether²⁷ unless the statute provides for their continuance.²⁸ If a statute names the members of a corporation and requires them to be shareholders it would seem that no action is necessary on the part of the corporation to constitute the incorporators shareholders,²⁹ for it has no option to accept or reject,³⁰ its obligation to receive as shareholders being the statutory return for the statutory obligations of the shareholders.

Shares of stock have had so many of the qualities of choses in possession ascribed to them that the precise nature of the

Mo. 130. See also *Kirkwood Gymnasium Assn. v. Van Ness* (1895) 61 Mo. App. 361; *Business Men's Assn. v. Williams* (1909) 137 Mo. App. 575, 119 S. W. 439.

24. *Coyote Gold and Silver Mining Co. v. Ruble* (1880) 8 Oregon 284; *Densmore Oil Co. v. Densmore* (1870) 64 Pa. St. 43; *Bristol Trust Co. v. Jonesboro Trust Co.* (1898) 101 Tenn. 545, 48 S. W. 228; 1 Machen, Corporations, § 164 *et seq.*

25. While a few statutes have the positive requirement of shareholding for membership and some have it by implication, many of the statutes are silent on this point. See 1 Machen, Corporations, § 132.

26. In *San Joaquin Land & Water Co. v. Beecher* (1894) 101 Cal. 70, 35 Pac. 349, they are said to be the agents of the intended shareholders. *Sed qu.*

27. "They are *functi officii* and the corporation is thenceforth composed of the shareholders." *Densmore Oil Co. v. Densmore* (1870) 64 Pa. St. 43, 54. Hence the statement that "corporators exist before stockholders and do not exist with them." *Chase v. Lord* (1879) 77 N. Y. 1, 11.

28. In *Case of Philadelphia Savings Institution* (1836) 1 Wharton 461, note, some of the members were and some were not shareholders.

29. See *Hawes v. Anglo-Saxon Petroleum Co.* (1869) 101 Mass. 385; 1 Machen, Corporations, § 164.

30. In *Windsor Electric Light Co. v. Tandy* (1894) 66 Vt. 248, 29 Atl. 248, it was said that the corporation is presumed to accept, which means that no acceptance is necessary. Registration is said to be required in *Dancy v. Clark* (1905) 24 D. C. App. 487. See Machen, Corporations, §§ 164, 242.

obligations of the shareholder and corporation *inter se* is often misconceived. A Missouri statute provides that stock is to "be deemed personal estate",³¹ and shares have been held to be "goods, wares and merchandise, within the purview of the statute of frauds";³² but in essence a share of stock is nothing more than a chose in action, the result of a bilateral undertaking. The shareholder's primary obligation is to pay to the corporation the par value of his shares or some other amount agreed upon, as it shall be demanded.³³ The corporation in turn is bound to admit the subscriber to the privileges which its charter and by-laws confer upon shareholders, to a degree of control corresponding to the relative importance of this and other holdings, to a proportionate share of such dividends as may be declared and to a proportionate interest in the property in case of dissolution. These bilateral obligations are the same whether they arise out of statute or contract.³⁴ It is therefore erroneous to conceive a subscription to stock to be a sale of property by the corporation,³⁵ for the corporation does not own its unissued stock. A subscription need not therefore comply with the statute of frauds³⁶ even tho a sale of stock is so restricted. Any later transfer of shares is effective as a novation in the choses in action, to which the corporation has assented in advance. This free assignability makes it unobjectionable to speak of a share of stock "as soon as it is created, as transferable property".³⁷

31. Revised Statutes 1909, § 2984.

32. *Fine v. Hornsby* (1876) 2 Mo. App. 61; *Tisdale v. Harris* (1838) 2 Pickering (Mass.) 9. The better view would seem to be *contra*. See Browne, Statute of Frauds (5th ed.) § 396; 1 Machen, Corporations, § 505.

33. *Hawley v. Upton* (1880) 102 U. S. 314.

34. It is for this reason that it is said that "the rights and duties of both parties grow out of contract." *Supply Ditch Co. v. Elliott* (1887) 10 Col. 327, 332, 15 Pac. 691; *Haskell v. Sells* (1883) 14 Mo. App. 91, 102.

35. As in *Thrasher v. Pike County R. R.* (1861) 25 Ill. 393.

36. *York Park Building Assn. v. Barnes* (1894) 39 Neb. 834, 58 N. W. 440; *Wemple v. St. Louis, etc. R. R. Co.* (1887) 120 Ill. 196, 11 N. E. 906.

37. *Haskell v. Worthington* (1887) 94 Mo. 560, 570, 7 S. W. 481; *Vanstone v. Goodwin* (1890) 42 Mo. App. 39; *Hamilton v. Finnegan* (1902) 117 Iowa 623, 91 N. W. 1039; 1 Machen, Corporations, § 504. In *Newman v. Mercantile Trust Co.* (1905) 189 Mo. 423, 88 S. W. 6, it was held that trover may be maintained for shares of stock.

This analysis indicates that shareholding membership involves in no sense a contract between various shareholders. There is no good reason for a disregard of the corporate entity here. Shareholders have some obligations *inter se*, but these are not contractual. The obligations of each shareholder are independent of other shareholders' obligations. Articles of incorporation may contain a contract between the various subscribers, but this is not a necessary part of them.

III VARIOUS TYPES OF PRELIMINARY AGREEMENTS

Since a corporation has no capacity to contract prior to its birth, no preliminary agreement can have the effect of constituting the parties thereto members or shareholders in the corporation. But the situation presents no inherent difficulty and the confusion in the cases is largely due to a failure to distinguish between the rights *inter se* of the subscribers and the rights of the later-created corporate entity. Numerous forms of preliminary agreements are possible, each of which should be construed with reference to the expressed intention of the parties. But there is an unfortunate tendency to lump all agreements in one class and to determine their validity according to principles not universally applicable. It is important in every case to see just what the parties have agreed to do.

Since preliminary papers are usually circulated by some specially interested promoter,³⁸ the agreement frequently takes the form of a contract between this promoter and each of the subscribers. If the subscriber is desirous of seeing the project a success, he may give his promise to take a certain number of shares in the corporation to be formed in return for and in consideration of the promoter's promise to put thru the organization, and perhaps to see that the subscriber is accorded the privilege of becoming a shareholder;³⁹ or the promoter may agree to con-

38. All preliminary subscribers are in a sense promoters. *Peninsular R. R. Co. v. Duncan* (1873) 28 Mich. 130.

39. It was held that there was no such promise in *Fettel v. Dreyfous* (La., 1906) 117 La. 756, 42 So. 259. In *Dennison v. Keasbey* (1906) 200 Mo. 408, 98 S. W. 546, the plaintiff and defendant entered into a contract to form a corporation, the plaintiff agreeing to render

vey to the corporation a tract of land or to transfer a stock of goods. Primarily this is a contract between the subscriber and the promoter, each acting for himself. The corporation when it is born can neither ratify nor adopt it. The subscriber usually contracts to enter into a contract with the corporation, but the corporation will be under no obligation to contract with him and if it refuses the subscriber will be relieved of his obligation to the promoter.

The promoter could of course recover for the breach of the subscriber's contract, tho it may be difficult to determine what damage he has suffered by reason of the subscriber's failure to contract with the corporation. In that the subscriber has bound himself to enter into a contract with the corporation, it is expressly a contract for the benefit of a third person, the corporation. Such contracts are enforced in Missouri both in gift beneficiary and payment beneficiary cases,⁴⁰ and no reason is perceived why they should not be enforced where the beneficiary, tho definite and ascertainable, is not in existence at the time the contract is made.⁴¹ Until the birth of a beneficiary, the obligation to benefit it would of course remain contingent upon its coming into being. The benefit to the corporation from the subscriber's promise consists in having an offer open for its consideration. It is a question of some nicety in the law of contracts whether such a "paid-for" offer can be withdrawn so as to preclude the completion of a contract by the corporation's accepting it. It would seem that even tho the "paid-for" offer relates to subject matter of such a nature that equity would refuse specific performance of a contract relating to it, the law may well disregard the attempt to withdraw or revoke the offer, thereby giving specific performance to the

personal services to promote the project, in return for which he was to be given five per cent of the capital stock. The plaintiff was not named a shareholder in the articles and the defendant, who had stock, was ordered to transfer to the plaintiff the amount stipulated for.

40. See 8 Law Series, Missouri Bulletin, p. 38. On the general subject of beneficiary contracts, see Professor Clark's article in 4 Law Series, Missouri Bulletin, p. 30, and Professor Williston's article in 15 Harvard Law Review 767.

41. *Saunders v. Saunders* (1891) 154 Mass. 337, 28 N. E. 270, which looks *contra*, was decided where no beneficiary contracts are enforceable.

contract to keep the offer open.⁴² No reason is perceived for distinguishing between a contract to keep open an offer made by one of the parties to the other and a contract to keep open an offer made by one of the parties to a third person, in this case the corporation.

It is usually held that prior to assent by the beneficiary, either party to a beneficiary contract may release the other.⁴³ In Missouri, the beneficiary's assent is presumed,⁴⁴ with the result that a release is impossible without the beneficiary's concurrence. The corporation is not in the position of the ordinary gift or payment beneficiary, however, for it is entitled to no benefit from the subscriber's offer, beyond that of considering it, without accepting the offer. In a sense, it assents to the contract made for its benefit when it considers the offer, but such assent might not preclude the promoter from releasing the subscriber. And prior to the incorporation, a release should be effectual for it can hardly be said that the assent of a non-existing beneficiary can be presumed.⁴⁵

42. This view has been expressed by Professor McGovney in a valuable article on "Irrevocable Offers," in 27 *Harvard Law Review* 644. An offer under seal should be treated as a "paid-for" offer where seals are not abolished. In *Nelson Coke & Gas Co. v. Pellatt* (1902) 4 Ontario 481, it was held that an offer under seal to take shares in an existing corporation was therefore irrevocable. But if no offeree is in existence, it is difficult to see how the offer can be irrevocable, even tho under seal or "paid-for." See *Hudson Real Estate Co. v. Tower* (1892) 156 Mass. 82, 84, 30 N. E. 465.

A contract for the sale of shares of stock will be specifically enforced where the shares are not procurable in the market, *Dennison v. Keasby* (1906) 200 Mo. 408, 98 S. W. 546, or where they constitute a controlling interest in the company, *O'Neill v. Webb* (1899) 77 Mo. App. 1. Some such special reason for the inadequacy of damages must appear. The contract of subscription for shares of stock is always specifically enforceable if completed, for it gives rise to the status of shareholder and the obligations of the shareholder, such as that of paying calls, may be specifically enforced in actions by the corporation.

43. *Wood v. Moriarty* (1885) 16 R. I. 201, 9 Atl. 427; *Williston, Cases on Contracts*, p. 410 note.

44. *Rogers v. Gosnell* (1875) 58 Mo. 589. Cf. *Amonett v. Montague* (1881) 75 Mo. 43.

45. A subscriber is released by any material departure from the original purpose or scheme unless he assents to it. *Norwich Lock Mfg. Co. v. Hockaday* (1893) 89 Va. 557, 16 S. E. 877. In *Haskell v. Worthington* (1887) 94 Mo. 560, 7 S. W. 481, it was said that the organization of a company with powers additional but incidental to

It is possible for a preliminary subscriber to give to a promoter a power of attorney to contract for him with the corporation when it is formed. In England, such a power is irrevocable "where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority", as for instance, where the object of the contract is to enable the promoter to obtain his purchase money for property to be sold to the corporation.⁴⁶ It would seem that such a power should be revocable where the promoter has no more at stake than the success of his efforts to put the corporation on its feet. If the authority is given as security for the performance of the contract between the subscriber and the promoter, it should be irrevocable. But this means only that the subscriber owes a specifically enforceable duty to the promoter to permit him to exercise the power, and the subscriber does not come under any obligation to the corporation except in consequence of an exercise of the power.⁴⁷

While analysis thus shows great difficulty in working out an irrevocable obligation of the subscriber on the principles of beneficiary contracts, there is another possibility of finding it, viz., on the principles of novation. The subscriber's contract with the promoter may conceivably admit of the corporation's being substituted for the promoter by a novation assented to in advance. The effect of such a substitution would be to relieve the promoter from further liability.⁴⁸ But a pre-incorporation subscription agreement will be so framed as to make these principles of nova-

those originally contemplated does not constitute such a departure, but the case was decided on other grounds. *Cf. Board v. Mississippi, etc. R. R. Co.* (1859) 21 Ill. 337; *Dorris v. Sweeney* (1875) 60 N. Y. 462; *Woods Motor Vehicle Co. v. Brady* (1905) 181 N. Y. 145, 73 N. E. 674. In *Southern Hotel Co. v. Newman* (1860) 30 Mo. 118, it was held error to exclude evidence that the venture to which the defendants subscribed was wholly abandoned and that the corporation was the result of a different venture. *Cf. Richmond Factory Assn. v. Clarke* (1873) 61 Maine 351.

46. *Carmichael's Case* (1896) 2 Ch. 643. The contract expressly provided that the power should be irrevocable.

47. See *Machen, Corporations*, § 251; *Mechem, Agency* (2d ed.) § 570 *et seq.* *Cf. Staroske v. Pulitzer Pub. Co.* (1911) 235 Mo. 67, 138 S. W. 36.

48. See *McArthur v. Times Printing Co.* (1892) 48 Minn. 319, 51 N. W. 216.

tion applicable only when there are such responsible promoters willing to bind themselves by contracts with subscribers, and these are frequently lacking. Thirdly, it may be asked whether it is possible for the prospective shareholders to contract among themselves so that each will be bound from the moment of subscribing.

It is competent for each subscriber to contract with each of the others or for each subscriber to contract with all of the others. Charitable subscriptions are sometimes enforced as such contracts.⁴⁹ But the subscribers do not in the ordinary case intend to exchange mutual promises, and a clear expression of such intention is necessary. Each case must be examined to determine whether as a matter of fact the subscriber's promise is given for other subscribers' promises. A may agree to take stock in return for B's agreeing to take stock, but this seldom occurs. The promises of the various subscribers may be mutual, but they rarely are so. If mutual, they are sufficient consideration for each other and the numerous bilateral contracts bind the various subscribers to each other. A defaulting subscriber could be sued for the breach by all of the others if the contract is construed to be with all the others,⁵⁰ or by each of the others if the contract is by each with each of the others; tho such a liability has seldom if ever been enforced.⁵¹ Such a contract does not have the effect of making the various subscribers partners.⁵² The subscriber may obligate himself to assist in the incorporation or to become a shareholder if the corporation will admit him after incorporation is completed.⁵³ The latter obligation is a beneficiary contract to enter into a contract with the corporation and should be treated as the similar contract with the promoter was treated above.

49. See Professor Williston's note on charitable subscriptions in *Parsons, Contracts* (9th ed.) p. 490.

50. *Cf. Moore v. Chesley* (1845) 17 N. H. 151.

51. It was suggested in *Lake Ontario R. R. v. Curtiss* (1880) 80 N. Y. 219; and the petition in *Loewenberg v. De Voigne* (1909) 145 Mo. App. 712, 123 S. W. 99, seems to have been framed on this idea.

52. 1 *Lindley, Companies* (6th ed.) p. 21. But see *Taylor, Corporations*, § 100.

53. Where the subscriber agrees to pay a certain sum to the treasurer of the corporation to be formed, it is clearly a beneficiary contract. *West v. Crawford* (1889) 80 Cal. 19, 21 Pac. 1123; *San Joaquin Land & Water Co. v. Beecher* (1894) 101 Cal. 70, 35 Pac. 349.

A subscription does not become a binding contract by reason of the fact that other persons are led to subscribe on the strength of it; and reliance is in no sense a consideration for the subscriber's promise. If A promises to give B ten dollars and C sells a coat to B in reliance on A's promise to B, A's promise does not therefore become binding. Nor should the fact that a corporation is organized in reliance on a subscriber's promise render that promise enforceable. Charitable subscriptions are in this respect treated anomalously by some courts in their anxiety to uphold them.⁵⁴ But the agreements in hand are not charitable subscriptions and unless the promise is made in consideration that the action be taken, in which case it is an offer to a unilateral contract, there is no reason why action unstipulated for and merely in reliance on a promise should make it binding. The fact that money is expended in incorporation furnishes no support for a subscriber's promise, for it is in no sense made in return for such expenditure.⁵⁵ Estoppel is frequently found in such cases, due to the confusion of promises with representations.

It is submitted that in the ordinary preliminary subscription agreement, the subscriber's promise to take shares is nothing more than a statement of his intention to do so and as such of no binding effect. It is possible to have a preliminary subscription made in such a way as to be binding; but in most of the cases it has not been done. A subscription may, however, constitute an offer to the corporation to be formed, which offer will bind the subscriber if properly accepted by the corporation. Such an offer is of course revocable at any time prior to acceptance.⁵⁶

54. *Pitt v. Gentle* (1871) 49 Mo. 74; *James v. Clough* (1887) 25 Mo. App. 153.

55. Addressing itself to the incorporation as consideration for the subscriber's promise, the Pennsylvania court said that "procuring legislation of any kind is not a consideration which will support even a direct promise to pay a fair compensation for the labor of the promisee about such a business." *Strasburg R. R. Co. v. Echternacht* (1853) 21 Pa. 220. Cf. *Jeanette Bottle Works v. Scholl* (1900) 13 Pa. Super. Ct. 96, 100.

56. It was suggested in *Knox v. Childersburg Land Co.* (1889) 86 Ala. 180, 184, 550, 578, that "the terms of the offer and the consideration it rests on may render it binding and irrevocable" and that "when it rests on a valuable consideration, it becomes an irrevocable option." One may conceive of an offeree's buying an option on the offer. Cf. *Sooy v. Winter* (Mo. 1915) 175 S. W. 132. But the corporation acquires no option in the subscriber's offer in the ordinary case.

The numerous cases which permit subscribers to withdraw before the incorporation is completed proceed on this ground.⁵⁷ Until the corporation comes into existence, it is inaccurate to speak of an offer to it for there is no offeree. The birth of the corporation obviates this difficulty but the offer ought still to be subject to withdrawal until actual acceptance by the corporation.⁵⁸ Such acceptance ought not to be presumed for it puts an obligation on the corporation.⁵⁹ The birth of the corporation in itself is in no sense an acceptance of the offer even tho effected in reliance on it.⁶⁰ When the unwithdrawn offer is duly accepted by the corporation, the contract of shareholding becomes complete and the relation of corporation and shareholder is created.⁶¹

A preliminary subscription may be so informal, however, that it is not even entitled to the dignity of an offer. A mere expression of the signer's intention to take shares in a corporation to be organized is of no more legal significance than an expression of one's intention to buy a horse.⁶² An offer must be found

57. *Hudson Real Estate Co. v. Tower* (1892) 156 Mass. 82, 30 N. E. 465 (1894) 161 Mass. 10, 36 N. E. 680, is the leading case permitting withdrawal before incorporation. See also *Knox v. Childersburg Land Co.* (1888) 86 Ala. 180, 5 So. 578; *Richelieu Hotel Co. v. International Military Encampment Co.* (1892) 140 Ill. 248, 29 N. E. 1044; *Vermillion Sugar Co. v. Vallee* (La., 1914) 64 So. 670; *Athol Music Hall Co. v. Carey* (1876) 116 Mass. 471; *Plank's Tavern Co. v. Burkhard* (1891) 87 Mich. 182, 49 N. W. 562; *Wright Bros. v. Merchants' & Planters' Packet Co.* (Miss., 1913) 61 So. 550; *Ashuelot Boot & Shoe Co. v. Hoyt* (1870) 56 N. H. 548; *Muncy Traction Engine Co. v. De La Green* (1888) 143 Pa. St. 269, 13 Atl. 747; *Badger Paper Co. v. Rose* (1897) 95 Wis. 145, 70 N. W. 302; *Doherty v. Arkansas, etc. R. R. Co.* (1905) 142 Fed. 104. See 8 Columbia Law Review 47.

But *contra*, the leading case of *Minneapolis Threshing Co. v. Davis* (1889) 40 Minn. 110, 41 N. W. 1026. See also *Nebraska Chicory Co. v. Lednicky* (1907) 79 Neb. 587, 113 N. W. 245.

58. *Starrett v. Rockland Co.* (1876) 65 Maine 374; *Bryant's Pond Steam Mill Co. v. Felt* (1895) 87 Maine 234, 32 Atl. 888.

59. In *Poughkeepsie, etc. Road Co. v. Griffin* (1856) 21 Barbour 454, 467, it was suggested that "acceptance may be presumed from the beneficial nature of the offer." *Sed qu.*

60. *Cf. Cleaveland v. Mullen* (1903) 96 Md. 598, 607, 54 Atl. 665.

61. So it is said that "the criterion of the liability of a subscriber to stock in a corporation is, whether any act has been done by which the corporation has been forced to receive the subscriber." *Kirkwood Gymnasium Assn. v. Van Ness* (1895) 61 Mo. App. 361; *Commerce Trust Co. v. Hettinger* (1914) 181 Mo. App. 338, 168 S. W. 911.

62. *Strasburg R. R. Co. v. Echternacht* (1853) 21 Pa. St. 220. But *cf. Shober v. Lancaster County Park Assn.* (1871) 68 Pa. 429.

to have been intended, and courts have a justifiable inclination to find that subscriptions are not idle expressions of intention.⁶³

The foregoing analysis emphasizes the importance of determining which of these situations is present in a particular case. But subscription papers have often been unskillfully drawn and without stopping to analyse them many courts have attempted to lay down general rules which, as this discussion shows, admit only of narrow application. The consequent confusion prevails generally.

IV MISSOURI STATUTES OF INCORPORATION IN RELATION TO PRELIMINARY AGREEMENTS

The various statutes of incorporation must now be examined with a view to determining how they affect the position of preliminary agreements as it has been set forth. These statutes may have no effect on such agreements; or they may invalidate them to the extent of excluding preliminary offers and contracts from any consideration by the corporation; or they may expressly impose the obligations of shareholders on preliminary subscribers who have assented. The provisions of the various statutes have probably been framed without much thought of these questions, for there is much diversity among them. But it is none the less important that they should be effectuated.

The first general act of incorporation in Missouri was enacted in 1849⁶⁴ providing for the organization of corporations for manufacturing, mining, mechanical or chemical purposes. The incorporators were required to sign and acknowledge and file in the office of the circuit clerk and a duplicate with the Secretary of State, a certificate giving names of directors but not of shareholders, and the persons who signed and acknowledged such certificate "and their successors" were made a corporation. None of the capital stock was required to be paid up and no definite

63. This is not true of charitable subscriptions in which no contract of shareholding is contemplated, and so in England and New York such subscriptions are held to be unenforceable gratuitous promises. *In re Hudson* (1885) 54 L. J. Ch. 811; *Twenty-third St. Baptist Church v. Cornell* (1890) 117 N. Y. 601, 23 N. E. 177.

64. Laws of 1849, p. 18.

amount had to be subscribed. In 1851⁶⁵ the act authorizing the formation of plank road companies required the articles of association to state the names of "the subscribers" and to be sworn to by at least two of them, and one thousand dollars of stock had to be subscribed. The railroad corporation act of 1855⁶⁶ incorporated the persons who subscribed the articles of association and "all persons who shall become stockholders" and required a certain amount of stock to be subscribed, five per cent to be paid in cash thereon. It also authorized the directors of a railroad company to open books of subscription "in case the whole of the capital stock is not before subscribed". The statute of 1865⁶⁷ as to telegraph companies required as a condition precedent that a certain amount of stock should be subscribed and that all the subscribers thereto should sign articles of association which should set forth the names of the subscribers, and provided that such signers together with "the persons who from time to time shall become stockholders" should be a corporation. The statute of 1865⁶⁸ as to fire and marine insurance companies required the incorporators to sign articles giving the names of the subscribers and stating that one-half of the capital stock should have been in good faith subscribed and five thousand dollars thereof paid up. The statute of 1865⁶⁹ as to life, health, stock and accident insurance companies provides for similar articles and incorporates the persons who sign them "their associates and successors". This is the first time that the expression "associates" appears in the Missouri statutes. The statute of 1865⁷⁰ as to savings banks and fund companies requires the majority of the shares to be subscribed before business is begun and requires that the president and secretary shall have filed a certificate in which the names of the stockholders are given. In 1865 the statute as to manufacturing and business companies was amended to require the filing of a certificate in the recorder's office in the county in which the company was to transact business.⁷¹ In

65. Laws of 1851, p. 259.

66. Revised Statutes 1855, p. 404.

67. Revised Statutes 1865, p. 348.

68. Revised Statutes 1865, p. 355.

69. Revised Statutes 1865, p. 365.

70. Revised Statutes 1865, p. 365.

71. Revised Statutes 1865, p. 367.

1868, all of the capital stock of savings banks and fund companies was required to be subscribed at the time of incorporation.⁷² In 1869 the statute as to manufacturing and business companies was amended and the articles were required to be signed and acknowledged by the incorporators and filed in the office of the recorder, and it was provided that "all persons so acknowledging and giving said certificate and their associates and successors" should be a body corporate.⁷³

In 1879 the section authorizing directors to open books of subscription after the organization of the corporation "in case the whole of the capital stock is not before subscribed" was transferred from the chapter on railroad corporations to the general chapter concerning private corporations, so that it thereafter applies to all corporations.⁷⁴ This section had required five per cent to be paid to the directors at the time of the subscription, and this requirement was continued until the whole section was repealed in 1909.⁷⁵

In 1879, the statute as to savings bank and fund companies⁷⁶ was amended to require the articles to state that all the stock had been subscribed and one-half paid up, and to give the names of all shareholders and the number of shares subscribed by each; such articles to be signed and acknowledged "by the parties thereto". The privilege of incorporating was given to any five or more persons associated by such articles and it would seem that only incorporators were "parties thereto" so as to be required to sign. The statute of 1879 as to manufacturing and business companies⁷⁷ gave the privilege of incorporating to any three or more persons who should have associated themselves by articles which were required to state that all the stock had been subscribed, one-half paid up, and to give the names of the several shareholders and the number of shares subscribed by each; such

72. Laws of 1868, p. 80.

73. Laws of 1869, p. 10.

74. Revised Statutes 1879, § 711.

75. Laws of 1909, p. 347. It is difficult to believe that the continuance of at least that portion of the section which required five per cent to be paid at the time of subscription was anything more than an oversight of the revisioners.

76. Revised Statutes 1879, § 902.

77. Revised Statutes 1879, § 926.

articles to be signed and acknowledged "by the parties thereto" and after proper filing the persons so acknowledging and "their associates and successors" were to be a corporation.⁷⁸

The statute of 1885 as to trust companies⁷⁹ authorized incorporation by three or more persons associated by articles stating the amount of the stock actually subscribed which had to be at least one-fourth of the authorized capital stock, and one half of the subscribed stock was required to be paid up and the names of the shareholders given; the articles to be signed and acknowledged "by the parties thereto" and the corporation to be composed of such persons "their associates and successors".

In 1899, a new statute⁸⁰ authorized the formation of world's fair and centennial expositions by any twenty-five or more persons associated by articles which were required to state that one-half the stock had been subscribed and ten per cent thereof paid up, and to give the names of the first fifty of the subscribing shareholders; such articles to be signed and acknowledged by the parties thereto and the persons so signing and acknowledging and their successors to be a corporation. It is very plain that the statute requires the naming only of the first fifty of the shareholders; that there may be other shareholders not named; and that all of the named shareholders need not sign the articles of agreement as "parties thereto". It is possible that under this statute incorporators would not be required to be shareholders.

No substantial changes were made in the statutes of incorporation in 1909, but in 1911 a wholly new statute⁸¹ concerning the organizing of manufacturing and business companies was enacted, by which incorporation is permitted to any three or more persons associated in articles of agreement which state the amount of the capital stock, that fifty per cent thereof has been subscribed and actually paid up, and which give the names of the several shareholders and the number of shares subscribed by each. The statute also provides for a later sale by the corpora-

78. The new statute of 1879, § 958 *et seq.* as to mutual saving fund, loan and building associations has no peculiar interest in this connection.

79. Laws of 1885, p. 123.

80. Revised Statutes 1899, § 1523.

81. Laws of 1911, p. 148.

tion of all of its stock "not subscribed and paid for at the time of its organization". The articles are required to be "signed and acknowledged and sworn to by all parties thereto, including the parties selected as directors or managers for the first year".⁸² Since a director must be a stockholder⁸³ it is impossible to see any reason for the specific requirement of directors' signing if they were included in the expression "parties thereto"; which seems to indicate that the expression "parties thereto" does not include all persons named as shareholders.

It is clear from the foregoing exposition that these statutes do not admit of general application. Each case must be decided with close reference to the actual terms of the statute under which incorporation is attempted. Where a statute does not require shareholders to be named it would seem that preliminary subscribers should not be required to sign articles of association; where the shareholders are required to be named, it would seem that all need not be incorporators, tho all named would of course be legal shareholders from the instant of the corporation's birth. The "parties" to the articles who are required to sign and acknowledge are the incorporators, not the shareholders,⁸⁴ as is clearly indicated by the statute of 1911 which expressly requires directors to be among such "parties", tho directors are of necessity shareholders; if all shareholders had to be "parties" to the articles, this express naming of directors would be superfluous.⁸⁵ If the statute does require shareholders to be named and requires all the stock to be subscribed, it would seem that the omission of the name of a preliminary subscriber from the complete list of

82. The acknowledgment since 1911 must be before some Missouri officer having a seal. This requirement works considerable hardship on non-residents who are named as original shareholders in the articles if they must sign and acknowledge as incorporators.

83. *Loomis v. Missouri Pacific Ry. Co.* (1904) 165 Mo. 469, 65 S. W. 962.

84. In *First National Bank v. Rockefeller* (1905) 195 Mo. 15, 93 S. W. 761, an attempt was made to hold the incorporators as partners and it was contended that the incorporation was ineffectual because some of the persons who signed the articles failed to acknowledge them; but the court refused to go behind the certificate of the Secretary of State. *Of Ryland v. Hollinger* (1902) 117 Fed. 216.

85. But the Secretary of State interprets the statute to require that all named shareholders sign. See his instructions issued in "Form for Incorporating Manufacturing and Business Companies."

shareholders would discharge him altogether; but this would not be true where all the stock is not required to be subscribed.

All of the statutes purport to incorporate the "parties" who execute the articles.⁸⁶ Since 1869, the statutes as to manufacturing and business companies have purported to incorporate the parties, "their associates and successors". The meaning of the word *associates* should be determined to some extent at least with reference to its meaning in the statute of 1865 as to life, health, stock and accident insurance companies, in which it made its first appearance in Missouri statutes. That statute required the incorporators to sign the articles of association stating the names of all the subscribers to the stock, tho there was no requirement that any particular amount of stock should be subscribed and it is fairly clear that all the subscribers were not required to act as incorporators. The *associates* at that time must have been subscribers to the stock who intended to be incorporators but who failed to act as "parties" to the articles which were filed. In the statute of 1869 as to manufacturing and business companies, in which the word *associates* was first used as to such companies there was no requirement that the subscribers or shareholders be named in the articles. At that time it must have meant subscribers who were not active as incorporators. No reason is perceived for the continued use of the word in the statute of 1879, in which all the stock was required to be subscribed and all the shareholders were required to be named, unless all of the named shareholders were not required to be incorporators; in which case *associates* must have been a designation for named shareholders who were not incorporators. To have pre-

86. *Quaere*, can one who signs and acknowledges the articles which name him as one of the shareholders, withdraw before the Secretary of State has issued the certificate? If corporate existence really does date from the time of filing a copy of the articles with the Secretary of State, Revised Statutes 1909, § 2975, it would seem that such withdrawal should be permitted. *Of* Revised Statutes 1909, § 3341. Where both signing and acknowledging of the articles are required, it would seem that one who signs but fails to acknowledge should not be bound as an incorporator. *Coppage v. Hutton* (1890) 124 Ind. 401, 24 N. E. 112; *Greenbrier Industrial Exposition v. Rodes* (1893) 37 W. Va. 738, 17 S. E. 305. In *Metropolitan Lead & Zinc Mining Co. v. Webster* (1906) 193 Mo. 351, 92 S. W. 79, an incorporator, who had been induced to become such by fraud, was held not liable on his subscription.

liminary subscribers not named in the articles included among "associates" under this statute, would be to abrogate the effect of the provision that all shareholders should be named. Conceivably, preliminary subscribers might become incorporators by force of the word *associates* without becoming shareholders, but such a result would be absurd under the Missouri statutes. Unless all the named shareholders were not required to be incorporators and as such to sign and acknowledge the articles between 1879 and 1911, it is difficult to find any meaning whatever for the word *associates* during that period. Since 1911, tho it is unnecessary that all of the stock should be stated to be subscribed, the names of the "shareholders" must be given in the articles. This provision will be abrogated if *associates* is made to include preliminary subscribers not so named, for by such inclusion they would become shareholding incorporators immediately upon the birth of the corporation. This, too, without any reference to the intent of the preliminary subscribers at the time of their signing. It is submitted that the proper interpretation of the word *associates* in the present statute as in the statute of 1879 which prevailed until 1909, will make it refer only to subscribers for stock who are named in the articles but who fail to execute them. And with the general practise compelled by the Secretary of State of having all named shareholders to execute the articles as parties thereto, the word *associates* becomes insignificant. But this does not mean that preliminary subscriptions are forbidden by the statute. It means that preliminary subscribers are not made incorporators by the statute and their relation to the corporation is therefore to be fixed without reference to the statute.

It is interesting to note that the new statute concerning the incorporation of building and loan associations enacted in 1915⁸⁷ provides for the incorporation of twenty-five or more persons associated by an agreement in writing, and all who may thereafter become associated with them, which articles are required to state the names of the *incorporators* and the number of shares subscribed and to be signed and acknowledged by any ten of the parties thereto.

87. Laws of 1915, p. 231.

V REVIEW OF MISSOURI DECISIONS

The Missouri courts have followed a tortuous course in dealing with preliminary subscription agreements. The first litigation to reach an appellate court was in *Southern Hotel Co. v. Newman*,⁸⁸ in which the Supreme Court held that it was error to exclude evidence that the original subscription paper which had been signed by the defendant had been abandoned and that the corporation was formed in reliance on a wholly new subscription list. The court said that "corporators would have no right to set aside or annul subscriptions at their pleasure, without the assent or acquiescence of the subscribers; but why may not the subscribers, before the rights of third persons have intervened, agree to abandon their subscription, and to regard it as no longer of any force or effect?" There was no other indication of the court's view of the nature of the preliminary agreement.

*Keane v. Beard*⁸⁹ and *Ghio v. Beard*,⁹⁰ in the St. Louis Court of Appeals, arose out of a preliminary agreement under which numerous persons agreed to take stock and to employ the defendant Beard as an agent of the corporation to be formed. The subscriptions were paid in advance to Beard in cash and notes, and he proceeded to purchase the property which the corporation was to be formed to handle, but the corporation was never formed. In both cases the plaintiffs recovered from Beard the amounts advanced, in actions which resembled actions for money had and received. It was held that other subscribers were not necessary parties and the court said "that so far as questions of procedure are concerned, the contract of subscription to the capital stock of a corporation has always been regarded as a several contract between each subscriber and the corporation or other contracting party". It is clear that the agreement was not considered the mutual contract of all the subscribers.

88. (1860) 30 Mo. 118. It is not clear in *LaGrange & Monticello Plank Road Co. v. Mayo* (1859) 29 Mo. 64, whether the defendant had signed the articles or a preliminary paper.

89. (1881) 11 Mo. App. 10.

90. (1881) 11 Mo. App. 21.

New Lindell Hotel Co. v. Smith,⁹¹ in the St. Louis Court of Appeals, involved an agreement by numerous persons with a Mrs. Ames to contribute certain sums of money to a corporation which she agreed to procure to be organized and to which she agreed to convey a site in St. Louis to be used for a hotel. It was in reality a series of bilateral contracts to which the various subscribers and Mrs. Ames were parties, tho each of the subscribers purported to contract with the others and the unborn corporation. The court held that the subscriptions enured to the benefit of the corporation so as to be enforceable by it and found the mutual promises of the several subscribers to be consideration for each other, wholly neglecting the consideration in Mrs. Ames' undertaking. The subscription seems to have been regarded as a subscription to stock, but it was only a donation of a bonus in which no contract with the corporation was contemplated. Even if there had been no bilateral contracts with Mrs. Ames, the subscriptions would have been enforceable after Mrs. Ames had performed the acts called for from her as the consideration.⁹²

In *Haskell v. Sells*,⁹³ the defendant had signed a preliminary subscription agreement in which each subscriber "agreed to take a certain number of shares of stock in the corporation to be formed and to pay the par value thereof to the corporation". The corporation was duly organized under the statute of 1870⁹⁴ and became insolvent. The defendant knew nothing of what had happened after his subscription until he was sued by the assignee to enforce a stockholder's liability. The lower court had held that the beginning of the contemplated business constituted an acceptance of the subscription; without any analysis, the St. Louis Court of Appeals treated the subscription as a contract enuring to the benefit of the corporation and the plaintiff recovered. It was intimated that a different result might have been reached under a statute requiring the articles to name all share-

91. (1882) 13 Mo. App. 7.

92. *Workman v. Campbell* (1870) 46 Mo. 309; *James v. Clough* (1887) 25 Mo. App. 153.

93. (1883) 14 Mo. App. 91.

94. *Wagner's Missouri Statutes* 1870, Art. VII.

holders. In pursuance of an option allowed him by the promoter, the subscriber in this case had notified the promoter who had solicited him that he would not take the stock and the promoter seems to have agreed to release him. This was before the incorporation, but the court thought it unavailing, tho little attention was given to the point.⁹⁵ If it had been inclined to find that the subscriber could withdraw, it is submitted that notice to the leading promoter who had induced the subscription was a sufficient notice of withdrawal.⁹⁶

The leading case in Missouri is *Sedalia, Warsaw & Southern Railway Co. v. Wilkerson*,⁹⁷ in which a railway company sought to enforce a preliminary agreement to take a certain number of shares of its stock against the estate of a subscriber who had died before the incorporation was completed. The statute then in force purported to incorporate the persons who had subscribed the articles of association and "all persons who shall become stockholders" and provided that the directors "may, in case the whole of the capital stock is not before subscribed, open books of subscription to fill up the capital stock of the company";⁹⁸ and it did not require shareholders to be named in the articles. The court held that the statute excluded any other method of becoming a subscriber to the capital stock of a corporation, except by signing the articles of association or by subscribing the book opened after the creation of the corporation. This interpretation was probably due to the influence of two New York cases cited by the court, *Troy & Boston R. R. v. Tibbits*⁹⁹ and *Poughkeepsie & Salt Point Plank Road Co. v. Griffin*,¹⁰⁰ both of which were decided under the New York statute which in terms provided that preliminary subscribers should also subscribe the articles of

95. The court cited *Hughes v. Antietam* (1870) 34 Md. 316, in which the subscriber signed the certificate of association.

96. *Hudson Real Estate Co. v. Tower* (1894) 161 Mass. 10, 36 N. E. 680; *Planters' & Merchants' Independent Packet Co. v. Webb* (Ala., 1908) 46 So. 977.

97. (1884) 83 Mo. 235.

98. Wagner's Missouri Statutes 1870, p. 299, and Laws of 1877, p. 371. The sections are the same as Revised Statutes 1879, §§ 711, 764.

99. (1854) 18 Barb. 297.

100. (1861) 24 N. Y. 150, overruling *Poughkeepsie & Salt Point Plank Road Co. v. Griffin* (1856) 21 Barb. 454.

association.¹⁰¹ The Missouri statute was copied from a later New York statute¹⁰² which in *Buffalo & Jamestown R. R. v. Gifford*,¹⁰³ decided two years before *Sedalia, Warsaw & Southern Ry. Co. v. Wilkerson*, was held "not to prescribe a fixed statutory mode of making a subscription".¹⁰⁴ Perhaps owing to its recentness, this later New York decision was overlooked by the Missouri court. A board of directors has power to open books of subscription independently of statute and the view of the Missouri court that the statute enumerating such a power excludes common law subscriptions perfected by the corporation's acceptance of preliminary offers or by its taking advantage of contracts made for its benefit, is wholly untenable and unsustained by authority.

But the judgment that the deceased subscriber's estate in *Sedalia, Warsaw & Southern Ry. Co. v. Wilkerson* was not liable on the subscription may be justified on other grounds. *Haskell v. Sells*, which had been decided a year previously, was not cited by the court and it was authority for holding that the corporation could recover on the contract made for its benefit before its organization in spite of the subscriber's death. But the subscription in *Sedalia, Warsaw & Southern Ry. Co. v. Wilkerson* was clearly not a mutual contract and *Haskell v. Sells* might have been repudiated; unfortunately the court gave no attention to this phase of the case. The subscription was only an offer to the corporation which it was impossible for the corporation to accept after its organization because of the previous death of the of-

101. N. Y. Laws of 1847, c. 210, and N. Y. Laws of 1848, ch. 140 are in this respect identical.

102. N. Y. Laws of 1850, c. 140, art. 4.

103. (1882) 87 N. Y. 294. See also *Pentinsular Ry. Co. v. Duncan* (1873) 28 Mich. 130.

104. The court said of the New York statute, in all respects identical with the Missouri statute: "It does not prohibit or forbid any other mode of subscription and it is not perceived that any public policy would be subserved by holding that any subscription valid at common law is invalid by this section of the statute, and we are inclined to the opinion that it was not intended by this section to prescribe a fixed statutory mode of making a subscription and that any contract of subscription good and valid at common law is still valid, notwithstanding this section."

feror.¹⁰⁵ It is for this reason that the right result was reached in *Sedalia, Warsaw & Southern Ry. Co. v. Wilkerson*.

Haskell v. Worthington,¹⁰⁶ in the Supreme Court, involved the same agreement passed on by the St. Louis Court of Appeals in *Haskell v. Sells*. The defendant Worthington was the last of the subscribers to sign, but he was held not liable on the ground that all of the capital stock as stated in the recorded certificate had not been subscribed.¹⁰⁷ *Haskell v. Sells* was not cited and the court did not address itself to the possibility of recovery where all the capital stock is subscribed¹⁰⁸ tho it seems to have been taken for granted. It was said *obiter* that the defendant was not released because the corporation as organized had additional powers to those contemplated at the time of the defendant's subscription, such additional powers being incidental to those contemplated.

In *Ollesheimer v. Thompson Mfg. Co.*,¹⁰⁹ the defending stockholders had signed the articles of association and it was entirely *obiter* that the court spoke of the contract of subscription, which was said to "inure to the benefit of the corporation as soon as it is formed", and to be a *polypartite* contract between each subscriber and each of the others "in a sense which creates an estoppel against the subscriber", which "estoppel enures to the benefit of subscribers subsequently signing".

*Davis v. Johnson*¹¹⁰ shows the possibilities of the preliminary situation in that the various subscribers who proposed to form a corporation, contracted with the plaintiffs to accept and pay for a building which the plaintiffs agreed to erect. The subscribers became liable to the plaintiffs when the latter erected the building as agreed and turned it over to the corporation,

105. *Wallace v. Townsend* (1885) 43 Ohio St. 537, 3 N. E. 601. Cf. *Beach v. Methodist Church* (1880) 96 Ill. 177.

106. (1887) 94 Mo. 560, 7 S. W. 481.

107. In *Sedalia, Warsaw & Southern Ry. Co. v. Abell* (1885) 17 Mo. App. 645, the statute expressly authorized the corporation to begin business before all of its capital stock had been subscribed, so the defendant who signed the articles of association was held liable tho all the stock had not been subscribed.

108. *Haskell v. Worthington* was approved in a dictum in *Hequembourg v. Edwards* (1899) 155 Mo. 514, 521, 56 S. W. 490.

109. (1890) 44 Mo. App. 172.

110. (1892) 49 Mo. App. 240.

irrespective of rights which each subscriber might have had against the corporation. Such a subscription constituted a bilateral contract with the builders, tho a further contract with the corporation was contemplated. Similarly, subscribers might become liable to promoters and the case is not unlike *New Lindell Hotel Co. v. Smith*.

In *Newland Hotel Co. v. Lowe Furniture Co.*,¹¹¹ the preliminary subscription was *ultra vires* to the corporation which made it and the subscriber was not bound. But the Kansas City Court of Appeals said that "the subscription if valid of course enured to the benefit of the plaintiff [the corporation]. This assertion is too well settled to require the citation of the authorities to support it". And the same court said of the same preliminary agreement in *Newland Hotel Co. v. Wright*,¹¹² "the subscription paper became as between the parties thereto a binding contract, the obligation of each and all being a consideration for the undertaking of every other subscriber. And said contract, good between the parties at the time, inured to the benefit of the corporation when subsequently formed." But the preliminary subscription paper in these cases was of the most informal sort and could not have been more than an offer which ripened into a contract when accepted by the corporation. In the latter case, after all the stock had been subscribed the defendant subscriber met with the other subscribers and participated in the meeting which appointed a committee to formally incorporate the company and "to sign as the holders of all the stock". This was held to estop him to deny his liability. But the stock was not all subscribed since the subscription of the Lowe Furniture Co. was void because it was *ultra vires*; this point was not noticed, but on the authority of *Haskell v. Worthington* it should have been held a sufficient defense.¹¹³ The incorporation was under the statute as to manufacturing and business companies¹¹⁴

111. (1897) 73 Mo. App. 135.

112. (1897) 73 Mo. App. 240.

113. *Of. McCoy v. World's Columbian Exposition* (1900) 186 Ill. 356, 57 N. E. 1043. But see *United States Vinegar Co. v. Foehrenbach* (1895) 148 N. Y. 58, 42 N. E. 403.

114. Revised Statutes 1889, §§ 2768, 2769, as amended in Laws of 1891, pp. 77, 79.

as enacted in 1879, but the court found it unnecessary to interpret its provisions.

A preliminary subscription was enforced in *Louisiana Purchase Exposition Co. v. Kunzell*,¹¹⁵ the corporation having been organized under the world's fair corporation statute of 1899.¹¹⁶ The only contention was that the condition that a certain amount of stock should be subscribed had not been complied with. The preliminary subscription constituted an offer to the corporation which had been accepted subsequently to its organization and no question was raised as to the validity of this contract.

*Shelby County Railway Co. v. Crow*¹¹⁷ is a companion case to *Sedalia, Warsaw & Southern Ry. Co. v. Wilkerson* and was decided by the St. Louis Court of Appeals under the same statute. The preliminary subscription was informal, each signer subscribing the amount set opposite his name as the amount of stock to be taken in a corporation to be formed. Tho it was bound to follow the decision of the Supreme Court in *Sedalia, Warsaw & Southern Ry. Co. v. Wilkerson*, the St. Louis Court of Appeals protested very vigorously against that decision, stating its view to be that a subscription to the stock of a corporation is a "trilateral contract, that is, an undertaking not only between the corporation and the individual stockholder, but it is an undertaking between the corporation, the individual subscriber and all other subscribers to the stock as well". One is surprised to read, however that this "doctrine obtains generally". Indeed, it cannot to be said to prevail except in Pennsylvania, where recent decisions have been to this effect.¹¹⁸ Tho contracts are now generally classified as unilateral and bilateral, the term trilateral has rarely been used. The common law does not seem to admit of the conception of a trilateral contract. It is possible for A to promise B in

115. (1904) 108 Mo. App. 105, 82 S. W. 1099.

116. Revised Statutes 1899, § 1523 et seq.

117. (1909) 137 Mo. App. 461, 119 S. W. 435.

118. *Graff v. Pittsburgh & Steubenville R. R. Co.* (1858) 31 Pa. St. 489; *Philadelphia, etc. R. R. Co. v. Conway* (1896) 177 Pa. 364; 35 Atl. 716; *Acetylene Light Co. v. Beck* (1898) 6 Pa. Super. Ct. 584; *Braddock Ry. v. Bily* (1899) 11 Pa. Super. Ct. 144; *Altoona Milk Co. v. Armstrong* (1909) 38 Pa. Super. Ct. 350; *Garrett v. Philadelphia Lawn Mower Co.* (1909) 39 Pa. Super. Ct. 78.

consideration of B's promise to C, B's promise in turn being in consideration of C's promise to A; or for A to be obligated to B and C severally, B to A and C severally and C to A and B severally by one agreement, the obligations being respectively in consideration of each other; but these are nothing more than series of bilateral contracts. The term *trilateral* indicates simply a number of separate obligations as the term *tripartite* indicates a number of parties. Contractual obligations at common law must be the result of either unilateral or bilateral contracts and even a unilateral contract must be at least bipartite. It would seem to serve no useful purpose to employ the ambiguous term *trilateral* in connection with subscription contracts. But for the decision in *Sedalia, Warsaw & Southern Ry. Co. v. Wilkerson*, the subscriber might have been held in *Shelby County Ry. Co. v. Crow* on the ground that the demurrer admitted that after the corporation was organized it had accepted the offer contained in the subscription and had tendered a certificate of stock to the subscriber. Such facts would seem to have entitled the corporation to treat the subscriber as a stockholder.

In *Business Men's Association v. Williams*,¹¹⁹ the defendant had subscribed an informal agreement to take stock in a corporation to be organized and after the incorporation had been completed had actually paid a part of his subscription. The corporation was organized under the statute concerning manufacturing and business companies¹²⁰ so that the St. Louis Court of Appeals was not bound to follow *Sedalia, Warsaw & Southern Ry. Co. v. Wilkerson* as it had been in *Shelby County Ry. Co. v. Crow*. The court expressed the view that the preliminary subscription constituted a valid contract between the subscribers for the benefit of the corporation to be formed, tho it did not clearly distinguish between such a contract and a mere offer to the corporation. It seems to have been thought that the mere organization of the company would in itself constitute an acceptance of an offer made to the corporation. The decision was put on the ground that the defendant was estopped to deny his lia-

119. (1909) 137 Mo. App. 575.

120. Revised Statutes 1899, § 1312.

bility after having paid a part of his subscription.¹²¹ The directors had been authorized to proceed with the organization of the company and to vote the stock of the subscribers as they might see fit. All of the stock had been issued to the persons who acted as incorporators and it was therefore impossible for the corporation to issue to the defendant any stock which had not previously been issued.

The attempt to form a corporation in *Loewenberg v. De-Voigne*¹²² was abortive. It had been preceded by an agreement among various persons that a majority in interest of the subscribers should organize a corporation for certain purposes and the defendant refused to participate in such organization. The petition was held bad on demurrer. It is not clear that the defendant had agreed to join in the incorporation or to take shares in the corporation when formed, but even if such were the case the agreement was too indefinite to be enforced.¹²³

In *Palais du Costume Co. v. Beach*,¹²⁴ the defendant was not one of the original subscribers. But the Springfield Court of Appeals seems to have thought an original subscription might be withdrawn before acceptance by the corporation.

Louisiana Purchase Exposition Co. v. Schnurmacher, first decided by the Springfield Court of Appeals¹²⁵ and later by the St. Louis Court of Appeals,¹²⁶ arose under the statute as to world's fair corporations¹²⁷ which does not substantially differ from the railroad corporation statute under which *Sedalia, Warsaw & Southern Ry. Co. v. Wilkerson* was decided, except that the articles of agreement, tho they must be signed by only twenty-five incorporators, must state the names of the first fifty subscribing shareholders and the corporation is to be composed of

121. *Kirkwood Gymnasium Assn. v. Van Ness* (1895) 61 Mo. App. 361, is in accord, but the defendant there was one of the incorporators. Cf. *Nebraska Chicory Co. v. Lednicky* (1907) 79 Neb. 587, 113 N. W. 245. *Quaere*, whether the giving of a note for a part of the subscription would have the same effect.

122. (1909) 145 Mo. 712.

123. *Watson v. Bayliss* (Wash., 1913) 128 Pac. 1061.

124. (1910) 144 Mo. App. 456, 129 S. W. 270 (1911) 163 Mo. App. 499, 143 S. W. 852.

125. (1910) 151 Mo. App. 601, 132 S. W. 326.

126. (1911) 160 Mo. App. 611, 140 S. W. 1198.

127. Revised Statutes 1899, § 1523 *et seq.*

those who acknowledge the articles of agreement and their successors. The preliminary agreement is not set out in terms and neither court gave attention to the nature of the contract, but assuming it to exist distinguished the statute so that the subscriber might be held.

The question as to the effect of a preliminary subscription is squarely presented in the recent case of *DeGiverville Land Co. v. Thompson*¹²⁸ in the St. Louis Court of Appeals, which arose under the statute as to manufacturing and business companies in force until 1911. Numerous persons subscribed for certain numbers of shares of stock in a corporation to be formed for the purchase and sale of certain land, and appointed a committee to effect the purchase and to borrow money and give a deed of trust for this purpose if necessary and to cause to be formed a corporation to which such land should be conveyed. The committee prepared articles of agreement which named an attorney, not a member of the committee, as the holder of a large number of shares which had been subscribed for by numerous persons of whom the defendant was one. The committee then borrowed a sum of money equal to what defendant agreed to pay for shares and consummated the purchase, taking title in the name of the corporation. The corporation sued for the amount of defendant's subscription and recovered. It was held that the statute¹²⁹ does not require the subscribers to sign the articles of association, and that they are included in the word "associates", and on this ground the court distinguished *Sedalia, Warsaw & Southern Ry. Co. v. Wilkerson* and *Shelby County Ry. Co. v. Crow*. It was admitted by the court that the statute of 1909 requires all named shareholders to sign the articles¹³⁰ but stated that there could be incorporators who did not sign;¹³¹ the effect of this would be that there were incorporators who were not shareholders. Surely this is not a proper interpretation of

128. (1915) 190 Mo. App. 682, 176 S. W. 409.

129. Revised Statutes 1909, § 3339 *et seq.*

130. This as a result of the requirement that the articles state "the names and places of residence of the several shareholders" and be signed "by the parties thereto".

131. This as a result of the incorporation of the persons who acknowledge the articles, and their "associates" and successors.

the statute. The court said that the preliminary agreement constituted a trilateral contract and spoke of the mutual promises of other subscribers as consideration for the defendant's promise which inured to the benefit of the corporation. But on this theory there was a breach of the contract of the other subscribers for defendant was not named as a shareholder and another person was named in his stead. When it came into being the corporation had all of its capital stock held by the shareholders named in the articles who were entitled to certificates therefor. The corporation was bound to treat the attorney as the holder of the number of shares which had been set opposite his name in the articles, for it was in no way affected by the attorney's obligations to the defendant.¹³² It could not have treated defendant as a shareholder without going beyond its authorized capital stock and such conduct would have been *ultra vires*.¹³³ Defendant was therefore left to his recourse against the committee and it is a question of interpretation of its authority whether it could have compelled him to receive from the attorney some of the shares which he held. The lender of the money may have had an action against the defendant for money lent if it could be shown that the defendant authorized money to be borrowed when he was not entitled to any shares as against the corporation but not otherwise. If the defendant was included among the "associates" as an original incorporator, then we should have an anomalous situation in which both the attorney and the defendant would be entitled under the statute to the same shares of stock. It is difficult on any theory to work out liability to the corporation. The court attempts this by saying that the defendant contracted with the corporation "for the benefit of all the subscribers on the theory of a trilateral contract", having previously treated it as a contract between the subscribers for the benefit of the corporation. This confusion is due to a failure to keep in mind the distinction between a contract between various persons for the benefit of the corporation, in no sense a trilateral but simply

132. *Boatmen's Bank v. Gillespie* (1908) 209 Mo. 217, 108 S. W. 74, quoting with approval from 1 Morawetz, *Corporations* (2d ed.) § 304.

133. See note 11, *infra*.

an ordinary contract for the benefit of a third person, and an offer to a corporation which ripens into a contract when accepted by the corporation, which contract is for the benefit of the corporation alone. If such an offer be found in this case, it could not be accepted by a corporation whose capital stock was already fully subscribed. The court really disregarded the corporate fiction in this case to justify a recovery by the corporation. It may well be doubted whether in making the attorney a shareholder instead of the defendant, the committee did not violate its instructions so as to release the defendant altogether.¹³⁴ But if the defendant was liable at all, it would seem that the suit ought to be in the name of the attorney or the committee or the lender.

It is also sought to justify the result of the decision in *De Giverville Land Co. v. Thompson* by saying that the defendant was estopped to deny his liability for what the committee as his agents had done. In this respect the case is unlike *Newland Hotel Co. v. Wright* where the defendant met with the other subscribers and authorized the committee "to sign as the holders of all the stock", with the understanding that the stock should subsequently be issued, really transferred, to the subscribers. Here the defendant had given the committee no such authority and the committee organized a corporation which was not in any way bound to treat the defendant as a stockholder, tho it is possible that the attorney could have been treated as a constructive trustee of the stock for the defendant. The committee owed no contractual duty to the defendant except that which every agent owes to his principal, and it's members did not purport to contract with the corporation as agents of the defendant, tho they may have borrowed the money as his agents. It is difficult to see, therefore, how the unauthorized act of his agents constituted any representation to the corporation which would estop the defendant.¹³⁵

134. *Of. Birmingham National Bank v. Roden* (Ala., 1892) 11 So. 883, where one who was named in the articles as a shareholder recovered from the corporation which issued the shares, to which the plaintiff was entitled, to a promoter.

135. *Of. Ottawa Dairy Co. v. Sorley* (1904) 34 Canada Sup. Ct. 508. Nor can the decision in *De Giverville Land Co. v. Thompson* be justified on the authority of *Carmichael's Case* (1896) 2 Ch. 643, cited in note 46, *supra*.

VI SUMMARY

These decisions leave preliminary stock subscription agreements in a precarious and unsatisfactory position in Missouri law. It can be much improved by a careful revision of the statutes of incorporation so as to make it clear who are incorporators and who are initial shareholders so constituted by the statute. Meanwhile there must be some interpretation of past and present statutes with reference to corporations organized under them.

As to the railroad statute in which no change material in this respect has been made since it was first enacted in 1855, it is submitted that the decision in *Sedalia, Warsaw & Southern Ry. Co. v. Wilkerson* ought to be overruled. As to railroad corporations organized since 1909, that decision is not binding in view of the fact that it rests so largely on an interpretation of the statute authorizing directors to open books of subscription, which section was repealed in 1909.

As to manufacturing and business corporations, it is improbable that any cases will arise under the old statutes which prevailed prior to 1879. Under the statute as it existed from 1879 to 1911, it is difficult to find any room for preliminary subscribers since all the stock had to be subscribed and all the shareholders had to be named in the articles, tho the statute purports to incorporate "associates". *Newland Hotel Co. v. Wright* and *Business Men's Association v. Williams* do not determine the construction to be placed on this statute for both cases can be rested on estoppel. It is submitted that this statute was misapplied in *De Giverville Land Co. v. Thompson*. No case has arisen under the statute of 1911—it is submitted that since all of the stock is not required to be subscribed, preliminary subscribers who do not become incorporators and who are not named as shareholders in the articles, may nevertheless become shareholders after incorporation. This is clearly permitted by the statute as to world's fair companies.

The statute as to telegraph and telephone companies has since it was first enacted in 1865 required all preliminary subscribers to sign the articles. The new statute of 1915 as to building and loan associations does not in any way restrict preliminary subscriptions.

Apart from statute, it is difficult to state the result of the Missouri decisions as to the legal effect of the preliminary subscriptions. The courts show a disposition to find a mutual contract between the subscribers in every case, but all of the decisions except *Haskell v. Sells* can be explained by saying that the subscribers had made an offer which the corporation accepted after its organization. *Haskell v. Sells* is authority for the proposition that the subscription constituted a contract from which the subscriber cannot withdraw even before the organization is completed. The opinion is poorly considered and the holding is opposed to the great weight of authority in other states.

It is suggested that preliminary subscribers should always be made to sign the articles of association, and that to avoid the consequences of their refusal to do so, the preliminary subscription should always be made to take the form of an agreement between the promoter and each subscriber, by which both will become obligated from the moment of the latter's signing.

MANLEY O. HUDSON.¹³⁶

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NOTES ON RECENT MISSOURI CASES

CONTRACTS—MUTUALITY OF OBLIGATION. HUDSON v. BROWNING.¹—Each of the promises in a bilateral contract must impose on the respective promisor some definite legal obligation.² This is usually expressed by saying that there must be "mutuality of obligation". The expression is apt, but it is sometimes mistaken as a requirement of equality between the obligations or of adequacy of each promise as consideration for the other.³ A legal obligation must be sufficiently definite to admit of being measured. An exact measure, expressed in so many pounds, or cords, or days of labor, is not necessary, but the undertaking must be so expressed that the words when taken together with admissible evidence of the circumstances surrounding the transaction fix a standard of admeasurement by which the obligation will ultimately be rendered certain in extent.⁴

Hudson v. Browning,¹ recently decided by the Supreme Court, illustrates the difficulty in determining whether a promise is sufficiently

1. (1915) 174 S. W. 393.

2. 1 Parsons, Contracts (9th ed.) p. 486, note; 1 Page, Contracts, p. 452.

3. *Forbes v. St. Louis, I. M. & S. R. Co.* (1904) 107 Mo. App. 661, 82 S. W. 562.

4. *Wells v. Alexander* (1891) 180 N. Y. 642, 29 N. E. 142. See 11 L. R. A. (N. S.) p. 713.

definite to impose a legal obligation on the promissor so as to be a good consideration for a promise. In a written agreement executed on February 25, 1910, the plaintiffs agreed to make, purchase and deliver to the defendant and the defendant agreed to accept and pay for, all the ties of certain grades that the plaintiffs "may be able to purchase or make up, to 200,000 ties, commencing on this date and ending June 1, 1911". The plaintiffs "do not bind themselves to make or purchase and deliver the full 200,000 ties, but they do bind themselves to use every effort at their command to secure as many of the 200,000 ties as their time, money and efforts will permit them, and so long as they do this said second party will not permit any other person or firm to purchase ties for them in the territory . . . ". The defendant agreed "to purchase and receive from said first parties the full 200,000 ties enumerated above, or any portion thereof, within the time-limit stated above, if said first parties with their best efforts are able to secure that many". The court held that there was no mutuality of obligation because the "plaintiffs by their contract do not agree to furnish the full 200,000 ties or any definite portion thereof Nothing is said in what territory their efforts shall be used. The amount of time to be used is uncertain and indefinite, as is also the money to be used".

The Supreme Court relied upon the decision of the St. Louis Court of Appeals in *Campbell v. American Handle Co.*,⁵ where the plaintiff "was to cut and deliver at the defendant's factory" all the ash timber of certain lengths which he "could cut and haul off" a described tract of land between specified dates; which agreement was held to be unenforceable. In *Hazelhurst Lumber Co. v. Mercantile Lumber & Supply Co.*,⁶ recently decided by the United States Circuit Court for the western district of Missouri, the defendant agreed to purchase, receive, and pay for all the ties that plaintiff could produce and ship to defendant until January 1, 1908. No limits were placed on the plaintiff, no territory was specified, no maximum or minimum amounts were named, and the court very briefly dismissed the case by saying that "the contract is manifestly void for want of mutuality".⁷

In a more recent case in the St. Louis Court of Appeals, *Roster v. St. Louis & S. F. R. R. Co.*,⁸ the defendant was to purchase at a fixed

5. (1906) 117 Mo. App. 19, 94 S. W. 815.

6. (1908) 166 Fed. 191.

7. But compare the *dictum* of Ray, J., in *Shippy v. Stevens* (1910) 177 Fed. 484, 486: "If the conduct and associations of A are such that they tend to bring disgrace on B, a relative of A, and B agrees with C that C shall do all he can and use his best efforts to break up such associations and cause such conduct to cease, and that he will in consideration of such efforts and expenditure of time and thought, pay C the sum of \$5000, and there is a time limit for performance, and C fully performs on his part, can there be any doubt but that C may recover the consideration agreed to be paid? I think not. It is not necessary that the promissor in such a case receive an actual benefit by way of the success of the efforts of C. It is all-sufficient that he had the benefit of the efforts of C in a matter which interested him, B."

8. (1910) 147 Mo. App. 290, 126 S. W. 532.

price per yard all the rock and dirt which the plaintiff could get out of a quarry during a specified time. The court held that it was a valid agreement not lacking in mutuality and that it was sufficiently certain altho a minimum amount was not stipulated. In *Campbell v. American Handle Co.* the maximum amount was all the timber the plaintiff could cut from a described tract of land. In *Rozier v. St. Louis & S. F. R. R. Co.*, it was all the stone the quarry-man could get out of a certain quarry. In this respect, therefore, no distinction can be drawn between the two cases even tho it is stated in the latter case that the parties were acquainted with the output of the quarry, because that circumstance only serves to make *Rozier v. St. Louis & S. F. R. R. Co.* as certain as *Campbell v. American Handle Co.*, in that timber on the surface can be more accurately computed than strata of rock hidden in the earth, which strata are likely to be unexpectedly exhausted at any time. In *Hudson v. Browning*, however, we find no such difficulty. The maximum is stated in definite numbers. As to the minimum amounts, *Campbell v. American Handle Co.* and *Rozier v. St. Louis & S. F. R. R. Co.* are again similar, unless the different types of business furnish a basis for distinction. Perhaps quarrying is a more standardized business than tie-cutting. And yet, even a tie-cutter, who ordinarily employs as many men and teams as a particular job calls for, has a minimum force and that minimum will do some work and therefore a promise to use his best efforts would be a promise of something of value, which promise is consideration for a promise. The court in *Rozier v. St. Louis & S. F. R. R. Co.* offers to distinguish *Campbell v. American Handle Co.* as a case in which "there was no agreement to sell the whole yield of the factory, but simply to sell and deliver to the defendant timber of certain lengths without in any way designating the quantity". But it is not perceived that an agreement to sell the whole output of a factory is any more definite than an agreement to sell all the timber of a certain description which one can by using reasonable efforts cut and haul off of a certain tract of land within a certain time. It is submitted therefore that in effect *Rozier v. St. Louis & S. F. R. R. Co.* overrules *Campbell v. American Handle Co.*

In *Hudson v. Browning*, no question was raised as to the sufficiency of the defendant's promise. The plaintiffs promised to use "every effort at their command to secure as many of the 200,000 ties as their time, money and efforts would permit." The court considered this too indefinite and compared it with a promise to buy as much as the promissor "may desire",⁹ or "might want or desire in his business",¹⁰ or "might want in the general foundry business during a cer-

9. *American Cotton Co. v. Kirk*, (1895) 68 Fed. 791.

10. *Cold Blast Transp. Co. v. K. C. B. & N. Co.* (1902), 114 Fed. 77.

tain period",¹¹ all of which promises are void for want of certainty and mutuality, the one party not binding himself to want or desire any amount. But a promise to buy "its requirements of coal",¹² or steel casting,¹³ or a promise to sell "all the blankets of his manufacture",¹⁴ is definite and substantial, because the amount to be furnished will ultimately be rendered certain by the means of admeasurement agreed upon. Similarly, it would seem that the amount which time, money and efforts will make and purchase will be rendered certain by a measure just as accurate. And as the requirement of a business or its output is not determined by the caprice of its owner, so the amount of money on hand, as well as time and efforts, is none the more subject to the whim of its master—money plus time and efforts being as calculable as machinery plus time and efforts. The fact that the defendants promised not to permit "any other person or firm to purchase ties for them in the territory along or adjacent to the North Missouri Central Railway's line of road, for which the above ties are to be used for construction of said road," shows that the defendant was probably acquainted with the character and magnitude of the plaintiffs' business and thought it such a well established one as to justify him in entrusting to it the gathering of the ties needed in the construction of the road. But even if the defendant was not sure that the plaintiffs' time, money and efforts would deliver any ties,¹⁵ yet the plaintiffs' promise necessarily connotes that they would not make or purchase ties for any one else between February 25, 1910 and June 1, 1911.¹⁶ This limits their freedom of action for the future in that they cannot sell to anyone else during that time. Whether they did use their best efforts does not affect the validity of the contract; it is only material in determining whether the plaintiffs have broken their promise, and in the principal case the defendant does not rely upon any alleged breach.

That the conclusion from these observations is not without authority is shown in the Minnesota case of *Emerson v. Pacific, etc. Packing Co.*¹⁷ The defendant appointed the plaintiffs its exclusive agents for

11. *Tarbox v. Gotzein* (1873) 20 Minn. 139. See 11 L. R. A. (N. S.) p. 713.

12. *Minn. Lumber Co. v. Whitebreast Coal Co.* (1896) 160 Ill. 85.

13. *Lima Locomotive, etc. Co. v. National Steel Castings Co.* (1907) 155 Fed. 77.

14. *Hadden v. Dimick* (1866) 31 How. Prac. (N. Y.) 196, reversed in (1872) 48 N. Y. 661, on the ground that there was some evidence tending to show a parol waiver of the contract by the plaintiff which should have been left to the jury.

15. MARSHALL, J., in *McCall v. Ickes* (Wis., 1900) 83 N. W. 300, 302, says: "Mere indefiniteness as to the amount of material or goods which may be delivered under a contract or uncertainty even as to whether any will be delivered, is not necessarily a fatal uncertainty."

16. Williston's *Wald's Pollock, Contracts* (3d ed.) p. 196, 197.

17. (1905) 98 Minn. 1, 104 N. W. 573. Cited with approval in *Martin Water & Power Co. v. Town of Sausalito* (Cal., 1914) 143 Pac. 767, where MELVIN, J., in a dictum says: "Generally a contract by which one party agrees to use his 'best endeavors' to promote the sale of a commodity produced by the other party is valid and not wanting in mutuality." A dictum in *Spencer v. Taylor* (1904) 69 Kan. 493, 77 Pac. 276, is in accord.

a definite term to sell on commission eighty-five per cent of its pack of fish. The plaintiffs obligated themselves to use their "best efforts" to sell such pack. The court held without much argument that the promise was sufficiently definite, saying: "The plaintiffs accepted the contract and obligated themselves during the whole period named to use their best efforts to sell defendant's merchandise and actually performed services in introducing and defraying expenses thereunder. The promises, therefore, were not all on one side, there was mutuality of obligation." Damages awarded were such profits, past and future, as proximately resulted from the breach.

In *Taylor Co. v. Bannerman*,¹⁸ the plaintiff had agreed to act as agent of the defendant who agreed that the plaintiff should be his exclusive agent. The court held that the plaintiff's undertaking was good consideration altho the duties of the plaintiff were not definitely set out, for the plaintiff was bound to exercise "due diligence".

In *Mitchell Taylor Tie Co. v. Whitaker*¹⁹ the plaintiff agreed to deliver all the merchantable ties that he could make from his own lands, or purchase or acquire from others for one year, and the court held that the contract was mutually binding, the plaintiff being bound to exercise reasonable diligence. A very recent decision by the Court of Appeals of Kentucky, *Ayer & Lord Tie Co. v. O. T. O'Bannon & Co.*,²⁰ followed *Mitchell Taylor Co. v. Whitaker* and seems to settle the law in Kentucky. The defendant was to buy, inspect, receive and pay for all the ties that plaintiff "could or would" deliver before January 1, 1914. The court ruled that the words "or would" were inadvertently used, the contract being oral, and it held that with those words eliminated the contract was "not lacking in mutuality" and imposed upon the plaintiff the duty of exercising reasonable diligence to procure and deliver to the defendants all the ties that he could. Certainly the Kentucky court could not have required that a party in order to exercise "reasonable diligence" should do more than use "every means at their command to secure as many of the 200,000 ties as their time, money and efforts will permit", and yet the Missouri Supreme Court says this is not sufficiently definite.

A promise to do as much as one's time, money and efforts will permit is a promise to do as much as one is able. In such a promise the *amount* of performance is not fixed. On the other hand, in a promise to pay or to do something when able the *time* of performance is not set. The latter promise however, is held definite and substantial enough to impose an obligation to pay or do at the moment the promisor becomes able.²¹ It would seem, therefore, that the former

18. (1904) 120 Wis. 189, 97 N. W. 918. Cf. *Peck-Williamson H. & V. Co. v. Miller & Harris* (Ky., 1909) 118 S. W. 376; *Federal Iron & Brass Bed Co. v. Hock* (1906) 42 Wash. 668, 85 Pac. 418.

19. (1914) 158 Ky. 651, 166 S. W. 193.

20. (Ky., 1915) 174 S. W. 783.

21. Williston's *Wald's Pollock, Contracts* (3d ed.) p. 152.

should impose a similar obligation, and that the plaintiff's promise in the principal case should impose an obligation to perform as far as able. This would lead to the conclusion that the contract in *Hudson v. Browning* had sufficient mutuality to be enforceable.

J. P. H.

CONTRACTS—OFFER BACKED UP BY DEPOSIT. *SOOY v. WINTER*.¹—When an offer is supplemented merely by a gratuitous promise to keep the offer open for a fixed or for a reasonable time, it is elementary in the common law that the offer is just as revocable as if no such promise had been given. Where, on the other hand, an offer is supplemented by a contract to keep it open, that is, a promise supported by a consideration, or a promise under seal where seals retain their common law force, the offer cannot rightfully be withdrawn before the expiration of the time contracted for. In such case an offeree may ignore an intervening "revocation", accept the offer in spite of it and have all the rights that he would have had in case none had intervened.²

Whether any given thing done or promise made by the offeree as consideration for the promise of time is in law such, is determined by the ordinary rules. The general rule of course is that any act done or promise made by the promisee, provided it is the act or promise definitely called for either expressly or impliedly by the promisor as an exchange for his promise, is a sufficient consideration; subject not only to the proviso that an act or promise of an act which one is already legally bound to do is no consideration, but also to the rather vague proviso that tho the act or promise may be of the most trifling value yet it must be of *some* value in the eyes of the law.

It seems that the mere promise of an offeree to take the offer under advisement, that is, to consider it, falls of recognition as a sufficient consideration, by reason of the last proviso, for usually all that is meant by the parties to such an understanding is that the offeree promises to think it over. So impalpable a promise, resting as its performance would upon the mere say-so of the maker, may well be regarded by the law as of no value whatever.³

But suppose the promise to consider the offer means to both parties something more than thinking about it? Suppose land is offered for sale and the offerer proposes to keep the offer open ten days if the offeree will agree to go and look at the land, investigate the title and consider the offer? Clearly such a promise is sufficient con-

1. (1915) 175 S. W. 182.

2. See the discussion of these rules and of cases in which they may be modified by other principles, in 27 Harvard Law Review 644.

3. See *Boston & Maine R. R. v. Bartlett* (1849) 3 Cushing (Mass.) 224. Cases directly in point seem to be wanting, but if the law were otherwise than as stated in the text it is remarkable that in none of the numerous cases in which the existence of a consideration for an option has been in question, has the court found it in the easily implied undertaking of the offeree to "consider the offer."

sideration. So it has been said that a promise by the offeree to take the property off the market and consider no other offers is sufficient.⁴ Assume, on the other hand, that the offerer while promising to keep the offer open does not request the offeree to view the land or look up the title as an exchange for this promise, yet the offeree does these things; here again the offer is revocable at any time before a promise to buy is made.⁵ The apparent dictum in *Sooy v. Winter* that an offer cannot be withdrawn after the offeree has changed his position to his detriment in consequence of the offer⁶ is not accepted law.

This loss or detriment by change of position in consequence of the offer or in reliance upon a gratuitously promised time for deliberation seems in many cases a hardship on an offeree. Not having contracted for this time for deliberation, perhaps the offeree has only himself to blame; but it is argued, why should he not be recompensed, or merely reimbursed, for such expenditure as he has made in reasonable reliance upon the offerer's morally binding undertaking? It is admitted that the doctrine of estoppel does not apply; the promise regarded as a representation, is no more than a representation of intention.⁷

The great German jurist von Ihering advanced the view that the law ought to allow an action to recover damages for *culpa in contrahendo*, which for present purposes may be translated as recovery for damages or expenses suffered or undergone in mis-reliance upon the assumption that the promise was binding. It would differ from the usual quasi-contractual action to recover a benefit, an unjust enrichment, conferred upon the defendant, since it seeks to recompense the plaintiff for a detriment to him, tho no benefit accrued to the defendant. Recovery would be limited to reimbursement for actual detriment as distinguished from a contract action to recover for loss of prospective profits.

French jurists have also seen justice in this concept, but it is nowhere contended that the civil law has incorporated the principle into positive law, and certainly the common law has not. The Supreme Court of Louisiana recently decided a case in accordance with this principle, but upon rehearing evidently concluded that it had only the sanction of morality and not of law.⁸ The principle may be made operative by contract between the offerer and offeree. Thus an offerer unwilling to contract that his offer shall be irrevocable may for a consideration promise to reimburse, if he should revoke the offer, the

4. *Weaver v. Burr* (1888) 31 W. Va. 736, 8 S. E. 743.

5. *Comstock Bros. v. North* (1906) 88 Miss. 754, 41 So. 874.

6. See *Harriman, Contracts*, § 259. *Groomis v. McCully*, (1902) 93 Mo. App. 544, does not involve this fallacy. It was merely an offer contemplating acts as the acceptance and the offer was withdrawn before the acts were done, or even begun.

7. Ewart, *Estoppel*, p. 68 *et seq.*; Bigelow, *Estoppel*, p. 631 *et seq.*; *Harriman, Contracts*, § 649, and *cf* §§ 129, 150.

8. *Kaplan v. Whitworth* (1906) 116 La. 337, 50 So. 723.

offeree for any expense incurred in considering it. And the amount of damages thus payable may be liquidated by agreement.'

In *Sooy v. Winter*,⁹ the Kansas City Court of Appeals thought that there was some evidence that such an agreement had been made, and in this aspect of the case it rightly said that such a promise of liquidated damages must be supported by a consideration to render it enforceable. The fact that the offeree was a foreign corporation whose home office was at a great distance from the place in which the offer was submitted to a local agent, and that the time was given to enable the agent to transmit the offer to the company, and the company to consider it, did not incline the court to hold that even under these circumstances a promise to consider the offer was of value in the eyes of the law. Supposing the agent authorized to make the promise, this promise of the corporation to consider the offer, would seem no more than equivalent to the promise of a natural person as offeree to give it thought. The fact that a corporation's mental machinery is more cumbersome should not alone be a ground for giving it a better position as an offeree than has a natural person. The agent had no authority to sell at the price offered but, upon the offerer's depositing with him two checks for \$500 each, he agreed to transmit the offer to the company for its consideration. The corporation accepted the offer but before it had done so the offerer had given notice of a revocation, and now sued to recover \$500, one of the checks having been cashed. The plaintiff recovered judgment in the circuit court and defendant appealed. From respondent's brief, it seems that the plaintiff's theory below simply was that the offer was revocable and being timely revoked the offerer should have his deposit back. The defendant seems to have taken issue solely on the revocability of the offer. Of course, the deposit made by the offerer himself could not be a consideration for his own promise, and, as seen above, the offeree neither did nor promised anything of value. But this issue did not dispose of the case as the court said in remanding it.

Even on the assumption that a promise to pay liquidated damages might be inferred from the evidence (the agreement was oral), payable if the offerer withdrew the offer, and the court had found a consideration given for this promise, still the offer was revocable, because such an agreement is inconsistent with an absolute promise not to revoke; it seems that such an agreement should be construed as only a contract to recompense for *culpa in contrahendo*.

The evidence is not clear what understanding was had with reference to the deposit of the checks. Sometimes such deposits are made merely as an assurance of the seriousness of the offerer and as some

9. It is not suggested here that such an agreement should necessarily be inferred from evidence merely showing that a deposit was made to back up the offer.

10. (1915) 175 S. W. 132.

evidence of his ability to perform if his offer is accepted, and there is an understanding that the sum so deposited shall go as partial payment in case the offer is accepted, and returned if the negotiation falls thru for any reason. Nothing being said about forfeiture in case of revocation of the offer, this derogation from the normal rule could scarcely be implied from the agreement just stated. On the other hand, if there is evidence that the deposit was also made with reference to the dilemma in which the offeree might be placed by a revocation, an agreement ought to be inferred that the deposit was to be forfeited upon a revocation. If also it appears that the offeree was authorized to cash the checks at once, it seems that the case would be that of a payment which in case of acceptance was to be applied upon the purchase price, and in case of refusal to complete payment after acceptance or in case of revocation was to be retained by the offeree. No ground for the recovery of a payment under such circumstances is conceived. There is no mistake, duress, fraud, failure of consideration or other recognized ground of recovery.

Suppose instead of an advance payment there is a promise without consideration to pay a sum of money as liquidated damages for the detriment caused the offeree by a revocation of the offer, and the promised damages were voluntarily paid after the offer was revoked, could the offerer recover such payment? While, contrary to the intimation of the Kansas City Court of Appeals, the general rule is that a payment made on the erroneous assumption that one is under legal obligation to make it, unless it is a pure mistake of law, may be recovered, yet there is a well established exception that no recovery may be had where the defendant may in equity and good conscience keep it.¹¹ "Equity" in this rule is not used technically but in the loose sense of layman's justice. It is sufficient that the payee has a moral right to retain, and the essential justice of the theory of compensation for *culpa in contrahendo* demonstrates the existence of a well-recognized moral right in this case. The consideration necessary to render a promise enforceable is quite a different matter from the equities which entitle a payee to retain a payment. It is only promises, not payments, that need consideration.

Consequently, if the checks were deposited with an authority in the offeree to cash them upon a revocation, no recovery could be had whether upon the theory of payment or upon the theory of voluntary performance of a gratuitous promise to pay. The latter is true even if the offerer permitted the cashing under the erroneous belief that his deposit rendered binding his own promise not to revoke. Even a payment made under mistake cannot be recovered where the defendant holds *ex aequo et bono*. If the offerer labored under so curious

11. Woodward, Quasi-Contracts, § 20 *et seq.*; Keener, Quasi-Contracts, p. 48 *et seq.*

an assumption it may be that he had in mind deposits required to be made to back up offers or bids for public contracts, for statutes with reference to public contracts sometimes specifically declare the bids or offers irrevocable.¹² By the statute a gratuitous undertaking may be rendered obligatory. Most public contract statutes require a deposit with the offer, and whether the offer is expressly declared irrevocable or not, the statute is usually construed as forfeiting the deposit even where the offerer asks to withdraw his bid before the bids are opened or before the public body is bound on its side, where the latter refuses to permit withdrawal, makes the award and the bidder refuses to enter into a formal contract.¹³

D. O. McGovney.

CORPORATIONS—DISREGARD OF CORPORATE ENTITY WHERE CORPORATION AND STOCKHOLDER BEAR THE RELATION OF PRINCIPAL AND SURETY. MERCHANTILE TRUST CO. v. DONK.¹—The existence of a corporate entity has often been invoked by individuals as a disguise for fraud or as an instrument of oppression and wrong. In such cases, courts of equity and frequently courts of law² have unhesitatingly looked behind the corporate entity and have taken cognizance of the character, intent, motives and obligations of the individuals who compose the corporation. A brief summary of typical cases will illustrate the principles upon which the courts have proceeded in this regard. Where a person organized a corporation to do an act which if done by himself would have been a violation of a contract, the court refused to heed his contention that the corporation not himself was the actor.³ Where the same body of stockholders controlled two corporations and the affairs of the two companies were so conducted as to make one the mere adjunct or instrumentality of the other, it was held that the two corporations were identical so as to render the property of the one liable for the debts owed by the other.⁴ It should be observed

12. *Baltimore v. Robinson Construction Co.* (1914) 123 Md. 660, 91 Atl. 682.

13. *Baltimore v. Robinson Construction Co.*, *supra*; *Wheaton Building & Lumber Co. v. Boston* (1910) 204 Mass. 218, 90 N. E. 598; *Robinson v. Board of Education* (1901) 91 Ill. App. 100 (where the instructions to bidders expressly provided that the deposit should be forfeited if the bid were withdrawn before a stated time). See also, *Turner v. Fremont* (1909) 170 Fed. 259; *Kimball v. Hewitt* (1888) 2 N. Y. Supp. 697; *Davin v. Syracuse* (1910) 126 N. Y. Supp. 1002. *Of. New York v. Seely-Taylor Co.* (1912) 133 N. Y. Supp. 808.

1. (1915) 178 S. W. 113.

2. *Booth v. Bunce* (1865) 33 N. Y. 139; *Brundred v. Rice* (1892) 49 Ohio St. 640, 32 N. E. 169; *Donovan v. Purtell* (1905) 216 Ill. 629, 75 N. E. 334.

3. *Moore & Handley Hdw. Co. v. Towers Hardware Co.* (1888) 87 Ala. 206, 6 So. 41 (semble); *Beal v. Chase* (1875) 31 Mich. 490; *LePage Co. v. Russia Cement Co.* (1892) 51 Fed. 941; *Hagy v. McGuire* (1892) 147 Pa. St. 187, 23 Atl. 806.

4. *Donovan v. Purtell* (1905) 216 Ill. 629, 75 N. E. 334; *In re Muncie Pulp Co.* (1905) 139 Fed. 546, 71 C. C. A. 530; *In re Rieger, Kapner & Altmark* (1907) 157 Fed. 609.

here that mere identity of stockholders is not in itself sufficient to justify a disregard of the separate personalities of the two corporations; it must appear that the affairs of both are so managed and interrelated as to make them in reality but one concern.⁵ The same principles of course apply when an individual or partnership makes a similar use of the corporate organization. Where a person with the intent to hinder and delay creditors forms a corporation and conveys his property to it in return for stock, the courts refuse to be bound by the entity theory and will either compel a reconveyance or administer the property for the benefit of the creditors of the corporation.⁶ Nor will the courts tolerate the evasion of statutes by the aid of the device of incorporation. Thus where a shipper corporation owned and controlled another corporation which received commissions which were really illegal rebates, it was held that the two corporations were identical so as to make the receipt of rebates by the "dummy" corporation a receipt by the shipper.⁷ Attempts to evade the antitrust statutes have in the main been equally unsuccessful. Trusts have been dissolved on the principle that the acts and contracts of the persons holding all the stock are to be considered the acts and contracts of the corporation itself where the effect is the same as tho the corporation had acted or contracted as a corporation.⁸ Similarly, "holding companies" have been compelled to divest themselves of stock transferred to them in pursuance of the agreement of the stockholders of the companies sought to be combined.⁹ Clearly the authorities warrant the statement that "a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons".¹⁰

In the recent case of *Mercantile Trust Company v. Donk* the question of regarding the corporate entity was presented in an apparently novel situation which was complicated by the law of suretyship and of negotiable instruments. A hypothetical statement of the case may serve to bring into clearer relief the issue there presented. A, B, C,

5. *Gramophone & Typewriter, Ltd. v. Stanley* (1906) 2 K. B. 856, (1908) 2 K. B. 89; *In re Watertown Paper Co.* (1909) 169 Fed. 252, 94 C. C. A. 528; *Lange v. Burke* (1901) 69 Ark. 85, 61 S. W. 165; *Waycross Air-Line R. Co. v. Offerman & W. R. Co.* (1900) 109 Ga. 827, 35 S. E. 275.

6. *Bank v. Trebelin* (1898) 59 Ohio St. 316, 52 N. E. 884; 3 Cook, Corporations (7th ed.) § 672.

7. *U. S. v. Milwaukee Refrigerator Transit Co.* (1905) 142 Fed. 247.

8. *State v. Standard Oil Co.* (1892) 49 Ohio St. 137, 30 N. E. 279; *People v. North River Sugar Refining Co.* (1890) 121 N. Y. 582, 24 N. E. 834; *Distilling & Cattle Feeding Co. v. People* (1895) 156 Ill. 448, 41 N. E. 188; *State v. Creamery Package Mfg. Co.* (1910) 110 Minn. 415, 126 N. W. 126.

9. *Northern Securities Co. v. U. S.* (1903) 193 U. S. 197, 24 Sup. Ct. Rep. 436.

10. SANBORN, J., in *U. S. v. Milwaukee Refrigerator Transit Co.* (1905) 142 Fed. 247. On this general subject see an excellent article by Professor Wormser, "Piercing the Veil of Corporate Entity," 12 Columbia Law Review, 496.

D, and E, the sole shareholders in and directors of corporation X, endorsed a note given by X to M as collateral security for a loan made by M to X. A warehouse receipt covering goods of X was given to M as additional collateral. Later M surrendered the warehouse receipt to X. Are A and B thereby released *pro tanto*, assuming that their endorsement rendered them liable as sureties and that they did not consent to the surrender? Now, suppose transactions take place between M and X which constitute an extension of time and an alteration of the contract without the sureties' consent. In considering whether A and B are thereby released, are they to be treated as voluntary sureties or, having regard to the fact that they with the other directors received the entire benefit of the loan, as sureties for consideration? Under the latter alternative, A and B would come within the rule peculiarly applicable to surety companies by which a surety's right to stand upon the strict terms of his contract is abridged.

The answer of the court to the first question seems to be a clear disregard of the entity theory. It is said that "the defendants have been the recipients of every dollar borrowed and of this 8500 tons of ice [covered by the warehouse receipt], and have not lost a cent of it, while the plaintiff has received nothing except the interest", and that therefore it would be inequitable to allow the defendants to take advantage of the release of the security. Were this a suit against the directors individually to enforce the corporate obligation against them as being in reality the corporation, no authority whatever can be found which would allow the corporate existence to be so ignored. The corporation appears to have been duly organized for legitimate purposes and no element of fraud or improper use of the corporate organization enters into the case. But if, arising as the case does, it would be harsh and inequitable to allow the defendants the benefit of their defense, then no fondness for the entity theory should permit that result. The equities of the situation, however, do not, it seems, favor the plaintiffs so clearly as the court thinks. It is true that the defendants would have participated to the extent of stock held in whatever profit the loan brings and also in the proceeds of the goods surrendered, but should that benefit be forced upon them when it may occasion a much greater loss? If A and B are compelled to pay, they may be unable to indemnify themselves out of the corporate assets and thus may be compelled to bear not only their own share of the corporate debt, but also that of the other directors, when, but for M's act of releasing the securities, they would have been protected to some extent at least. It is a possible and not unlikely situation that the corporation was in debt, that the stock held by A and B was fully paid up, and that the company never paid a dividend after the loan was contracted. In such case A and B would have been benefited in no way by the loan, except possibly remotely by the en-

hancement of the value of their stock. Under these considerations, it is by no means clear that a disregard of the corporate entity should deprive A and B of the defense ordinarily available to sureties.

In answer to the second proposition the court says that A and B are sureties for consideration because "the sureties received the entire benefit of the \$25,000 borrowed from the plaintiff; and the mere fact that the money was placed in their corporate pockets instead of in their individual coffers should not affect their liability . . . ". Here again the language points to a disregard of the separate existence of the corporation. It seems somewhat inconsistent to regard the loan as in reality made to the individuals who composed the corporation and then to use that view to give to those individuals the character of sureties for profit. If the "corporate pocket" and the "individual coffers" are in truth one and the same receptacle for the income of the defendants, the defendants are principals and not in any sense sureties. Further, no authority exists for holding that anticipated dividends supply a consideration so as to make a stockholder a surety for hire. The rule of *strictissimi juris* has been relaxed only as against surety companies and that limitation is based upon the fact that those companies are organized for the purpose of being sureties, drawing their own contracts, specifying in minute details the conditions of their liability and charging rates based upon the risk assumed. They are therefore considered as insurers and are released by the action of the creditor only when their risk has been materially increased.¹¹ The same reasons do not apply to a suretyship contract of the type represented by the principal case.

It should be stated that the court did not rest the decision of the case wholly upon its views as to these two questions. It held at the beginning that the defendants were liable, not as sureties but as indorsers, and that therefore the rules of suretyship do not apply. Authorities are cited to prove that indorsers are not within the statute authorizing sureties to give notice to the creditors to bring suit. But these cases do not hold that an indorser is in no respect a surety nor do they deny that an indorser like a surety is discharged by an agreement to extend time, an alteration of the contract, or *pro tanto* by the creditor's surrender of security. The nature of the defendants' liability on their indorsement, as well as the other questions involved in the case, are not attempted to be worked out, as they do not fall within the scope of this note.

D. H. L.

DEDICATION AS A RESULT OF USER. *CARPENTER v. ST. JOSEPH*.¹—In *Carpenter v. St. Joseph*,¹ the Supreme Court was confronted with the

11. *Rule v. Anderson* (1912) 160 Mo. App. 347, 142 S. W. 358; *Lackland v. Renshaw* (1913) 256 Mo. 133, 165 S. W. 314; *Young v. American Bonding Co.* (1910) 228 Pa. 373, 77 Atl. 623.

1. (1915) 174 S. W. 53.

question whether a dedication of land will result from its being used by the public, in the absence of more positive evidence of an intention on the owner's part to dedicate it to the public. The plaintiff's predecessor in title had graded a path across the land in question for foot passengers, and it had been used for intermittent public travel for a number of years. This travel was on several occasions interrupted by fences which were soon torn down by boys. The owners had apparently continued to pay taxes on the land thruout the period of the public's use. The court enjoined the defendant from grading the land for a street, holding that there were no facts in the case which would authorize a finding that there had been a common law dedication. It seems to have been thought that a dedication by user could be accomplished only where the user is adverse.

The dedication of land to public use can be effected only where the owner gives clear expression of his intention to dedicate it. This expression may be found in a deed, or in a petition to have a way opened or in acts of the owner. Where the expression is in the acts of the owner, clearer proof is required and since the intention can only be inferred, the acts must unequivocally point to it. Thus merely leaving a lane thru one's farm for one's own convenience and permitting the public to use it as a highway, are not sufficient to show an intention on the owner's part to dedicate the land.² But where an owner of land conveys to another a part thereof and describes it as abutting upon a street when there is no such street, but a strip of the grantor's land answering to a street is left abutting the tract conveyed, the intention to dedicate the strip sufficiently appears.³

So also will acquiescence by the owner in the public use show an intention to dedicate when coupled with other facts such as setting aside part of his land as a highway,⁴ or making such statements as would lead the public to believe the land is dedicated.⁵ But acquiescence in the public use when unaccompanied by other acts is not sufficient evidence of an intention to dedicate even tho the user was for the statutory period.⁶ The existence of such an intention may be rebutted in a variety of ways, such as by the owner's paying taxes thereon,⁷ making conveyances of the land,⁸ or erecting bars and gates thereon to prevent the use of the land.⁹ The owner himself is not

2. *Kansas City, etc. Ry. v. Woolard* (1894) 60 Mo. App. 631.

3. *Field v. Mark* (1894) 125 Mo. 502, 28 S. W. 1004.

4. *New Orleans, etc. Ry. Co. v. Moya* (1860) 39 Miss. 374.

5. *Wilder v. St. Paul* (1866) 12 Minn. 192.

6. *Stacey v. Müller* (1851) 14 Mo. 478; *Lewis v. Portland* (1893) 25 Ore. 133, 35 Pac. 256; *Weiss v. South Bethlehem* (1890) 136 Pa. St. 294, 20 Atl. 801.

7. *Bauman v. Boeckeler* (1893) 119 Mo. 189, 24 S. W. 207; *Mauzer v. State* (1878) 60 Md. 357; *Topeka v. Cowee* (1891) 48 Kan. 345, 29 Pac. 560; *Case v. Favier* (1882) 12 Minn. 89.

8. *Hall v. Baltimore* (1880) 56 Md. 187.

9. *Jones v. Phillips* (1894) 59 Ark. 35, 26 S. W. 386; *People v. Reed* (1889) 81 Cal. 70, 22 Pac. 474.

allowed in Missouri to testify that he did not intend by his acts to express an intention to dedicate.¹⁰

An acceptance is necessary to complete the dedication proposed by the landowner.¹¹ In some jurisdictions an acceptance is presumed if the dedication is purely beneficial, but as the dedication of a highway imposes the burden of keeping it in repair, no presumption of acceptance can arise in such cases.¹² There is conflict as to whether mere user on the part of the public constitutes the necessary acceptance, some jurisdictions requiring an express acceptance by the proper officers.¹³ The prevailing view is that where land is dedicated to public use no formal acceptance is necessary, mere user by the public being sufficient.¹⁴ In many jurisdictions a distinction is made between the effect of user as evidence of acceptance against one who dedicates his land to public use, and as against the public authorities so as to charge them with the burden or repair. The weight of authority is that user is not sufficient for the latter purpose, some ordinance or assumption of jurisdiction over the way in question being necessary.¹⁵

Where there is an express dedication, or the owner's intent is clearly shown, the use by the public necessary to raise an implied acceptance need not be for the same period of time as is required when a title is sought to be established by adverse user alone.¹⁶ There are four views as to the length of time necessary to amount to an acceptance of the owner's offer of dedication. In North Carolina any user is sufficient.¹⁷ In some jurisdictions user for a reasonable length of time is all that is required.¹⁸ A third view, which is followed in Missouri is that a user for such length of time and under such circumstances that the public accommodation and public rights might be materially affected by an interruption of the enjoyment, constitutes an accept-

10. *Perkins v. Fielding* (1893) 119 Mo. 149, 24 S. W. 444. *Contra*; *Good-fellow v. Riggs* (1893) 88 Ia. 540, 55 N. W. 319; *Helm v. McClure* (1895) 107 Cal. 199, 40 Pac. 437.

11. *Kemper v. Collins* (1888) 97 Mo. 644, 11 S. W. 245.

12. *Wayne v. Miller* (1895) 31 Mich. 447; *Willey v. Illinois* (1889) 36 Ill. App. 809.

13. *O'Connell v. Bowman* (1891) 45 Ill. App. 654; *Dicken v. Liverpool Salt Co.* (1895) 41 W. Va. 511, 23 S. E. 582.

14. *Adams v. Iron Co.* (1889) 78 Mich. 271, 44 N. W. 270; *Gillean v. Forest* (1901) 25 Tex. Civ. App. 371, 61 S. W. 345; *Ray v. Nally* (1905) 28 Ky. 421, 89 S. W. 486; *Moble v. Fowler* (1906) 147 Ala. 403, 41 So. 468.

15. *Downend v. Kansas City* (1900) 156 Mo. 60, 56 S. W. 902; *Curran v. St. Joseph* (1910) 143 Mo. App. 618, 128 S. W. 203; *Drimmel v. Kansas City* (1914) 180 Mo. App. 339, 168 S. W. 280; *Winchester v. Carroll* (1901) 99 Va. 727, 40 S. E. 37; *Downing v. Coatesville* (1906) 214 Pa. 291, 63 Atl. 696; *Bessemer v. Carroll* (1908) Ala. 45 So. 419; *Jones v. Boston* (1909) 201 Mass. 267, 87 N. E. 589. *Contra*: *Beaudean v. Cape Girardeau* (1880) 71 Mo. 892; *Maus v. Springfield* (1890) 101 Mo. 613, 14 S. W. 630; *Elliot, Highways* (2d ed.) § 154.

16. *Ross v. Thompson* (1881) 78 Md. 90; *Bauman v. Boeckeler* (1893) 119 Mo. 189, 24 S. W. 207; *K. C. Milling Co. v. Riley* (1895) 133 Mo. 574, 34 S. W. 835; *Stewart v. Conley* (1897) 122 Ala. 179, 27 So. 303.

17. *Crump v. Mims* (1870) 64 N. C. 767.

18. *Parsons v. Atlanta University* (1871) 44 Ga. 529.

ance of the dedication.¹⁹ The fourth view is that user for a period equal to the period of limitation is conclusive evidence of acceptance.²⁰

The Missouri statute²¹ provides a method of dedication, which differs from the common law methods in that no acceptance is necessary to complete it.²² Statutory dedication is brought about by filing a plat of a city or an addition thereto, designating certain streets and ways for public use. As a result of the filing of such a plat, the ways so specified become dedicated without more. The statutory dedication purports to pass the fee,²³ while the effect of dedication in general is to give the public a mere easement or right of way over the land.

The public may acquire an interest in land by prescription. If the land is used openly, notoriously, adversely and continuously for the statutory period, and such user is acquiesced in by the owner, the public gains a prescriptive easement.²⁴ Many of the cases in which such user is established, speak of the land as dedicated to public use. Dedication requires an expressed or implied intention on the part of the owner to donate the land to public use.²⁵ No such intention appears when a prescriptive right is gained by adverse user, hence the latter cannot be a dedication in the absence of the essential elements of a dedication.

The court in *Carpenter v. St. Joseph*²⁶ stated that there was no act of the owners indicating an intention to dedicate. A street railway company which at one time owned the land graded a pathway across it for the convenience of foot passengers. This it would seem is a clear evidence of an intent to dedicate. If so, the public use of the land under the Missouri rule²⁷ was a sufficient acceptance and the land should have been held dedicated to public use, unless its effect was destroyed by the evidence that the taxes were paid by the owner of the land. The court, however, in reaching the opposite conclusion, seems to have based its opinion on adverse user and stated that to constitute

19. *San Francisco v. Canavan* (1872) 42 Cal. 541; *Brinck v. Collier* (1874) 56 Mo. 160; *Ross v. Thompson* (1881) 78 Md. 90; *Maywood County v. Maywood* (1886) 118 Ill. 61; *Rosenberger v. Miller* (1895) 61 Mo. App. 422.

20. *Conway v. Jefferson* (1866) 46 N. H. 521; *Remington v. Millard* (1847) 1 R. I. 98; *Kennedy v. Mayor of Cumberland* (1886) 65 Md. 514, 9 Atl. 234.

21. Revised Statutes 1909, § 10290 *et seq.*

22. *Buschman v. St. Louis* (1894) 121 Mo. 523, 26 S. W. 687; *Brown v. Carthage* (1895) 128 Mo. 10, 30 S. W. 312.

23. But see 5 Law Series, Missouri Bulletin, p. 27.

24. *State v. Young* (1858) 27 Mo. 259; *State v. Walters* (1879) 69 Mo. 463; *State v. Wells* (1879) 70 Mo. 638; *Zimmerman v. Snowden* (1885) 88 Mo. 218; *State v. Proctor* (1886) 90 Mo. 334, 2 S. W. 472; *Price v. Breckenridge* (1887) 92 Mo. 378, 5 S. W. 20; *Bauman v. Boeckeler* (1893) 119 Mo. 189, 24 S. W. 207; *State v. Baldridge* (1893) 53 Mo. App. 415; *Rosenberger v. Miller* (1895) 61 Mo. App. 422; *State v. Hood* (1910) 143 Mo. App. 313, 126 S. W. 992.

25. *Field v. Mark* (1894) 125 Mo. 502, 28 S. W. 1004; *Kansas City, etc. Ry. Co. v. Woolard* (1894) 60 Mo. App. 661.

26. (Mo., 1915) 174 S. W. 53.

27. *Brinck v. Collier* (1874) 56 Mo. 160; *Rosenberger v. Miller* (1895) 61 Mo. App. 422.

a dedication by adverse user there must be user under a claim of right with the knowledge and acquiescence of the owner, for a period equal to that of the statute barring a recovery of land. While the result which the court reached can be rested on other grounds, it is not clear that a proper distinction was drawn between dedication and prescription.

G. L. D.

RES JUDICATA—EFFECT OF REVERSAL OF JUDGMENT UNDER STATUTE ALLOWING REINSTITUTION OF SUIT. *GINOCCHIO V. ILLINOIS CENTRAL RAILROAD Co.*¹—This was an action brought by an administrator for the negligent killing of his intestate. Judgment was rendered for the plaintiff in the lower court and the defendant appealed to the St. Louis Court of Appeals where after thoro investigation and for causes going to the merits of the case, the judgment was reversed. At the conclusion of its opinion, the appellate court said:² "It becomes our duty to reverse the judgment and declare there is no right of recovery." The plaintiff then, under the statute hereinafter set out, instituted a new suit "within one year after the said judgment of reversal" and the trial court sustained a demurrer to the petition. On appeal, the Supreme Court held that such ruling was proper as the petition was predicated upon the same facts as the former petition, judgment on which had been reversed. The "reversal" mentioned in the statute was held to mean a reversal in which the merits had not been passed upon.

The statute³ in question provides that if the plaintiff begins his action within the time fixed by the proper statutes of limitations, and the plaintiff therein suffers a nonsuit, or after verdict for him the judgment be arrested, or after judgment for him, the same be reversed on appeal or error, such plaintiff may commence a new action from time to time, within one year after such nonsuit suffered, or such judgment arrested or reversed. Another section⁴ provides that the appellate courts may (1) affirm, or (2) reverse, or (3) reverse and remand for new trial, or (4) reverse with directions to enter a particular judgment, or (5) enter such judgment as the trial court should have entered. As the statute provides that a new action may be brought within one year after nonsuit suffered, the question immediately arises as to when plaintiff has "suffered" a nonsuit.⁵ At common law the plaintiff could take a nonsuit at any time before verdict.⁶

1. (1915) 175 S. W. 196.

2. (1910) 155 Mo. App. 163, 134 S. W. 129.

3. Revised Statutes 1909, § 1900.

4. Revised Statutes 1909, § 2083.

5. *Hevitt v. Steele* (1896) 136 Mo. 327, 38 S. W. 82; *Estes v. Fry* (1901) 166 Mo. 70, 65 S. W. 741. Cf. *Johnson v. United Rys. Co. of St. Louis* (1912) 243 Mo. 278, 147 S. W. 1077.

6. *Outhwaite v. Hudson* (1852) 7 Ex. 380, 21 L. J. Ex. 151; *Stewart v. Gray* (1830) 4 Hempst. 94, 23 Fed. Cases, No. 13428a; *Peeples v. Root* (1873) 48 Ga. 592.

But this rule is modified by our statute⁷ under which a nonsuit must be taken before the case is submitted to the court or to the jury. Clearly, then, a reversal is not equivalent to a nonsuit,⁸ tho the contrary was held in *Stevens Lumber Co. v. Kansas City Lumber Co.*⁹ *Stone v. Grand Lodge of United Workmen*¹⁰, and *Donnell v. Wright*,¹¹ as a judgment of reversal comes after a submission and usually after a consideration of the law and the facts, which adjudication of the issues is lacking in the event of nonsuit. Tho, as in *McQuitty v. Wilhite*¹² there may be cases wherein there might be a reversal without remanding and yet the issues upon the merits remain untouched.

It being established then that the plaintiff in the principal case had not suffered a nonsuit, there remains the question as to the effect of the simple reversal and its relation to his right to institute a new suit under the statute.¹³ The kinds and character of the judgments the appellate courts are authorized to enter¹⁴ must be kept in mind in considering this question. The language of the statute is not "if the judgment be reversed and remanded", but "if the judgment be reversed". A provision for a new action in case a judgment be reversed and remanded would be a mere redundancy; for obviously under such a judgment the plaintiff could proceed with his action without the aid of the statute and without any hindrance from the statute of limitations.

It is a question of policy whether the word "reversed" is to be limited to those cases of reversal in which the merits of the cause have not been adjudicated. Little aid can be found in the decisions in other jurisdictions, for most of the statutes provide that if the action is commenced within the proper statutory period and the plaintiff fails in any such action otherwise than on the merits and the time limit shall have expired, a new action may be commenced within one year after such failure.¹⁵ The statutes of Arkansas¹⁶ are identical with the statutes of Missouri, and the statutes of Alabama,¹⁷ of Illinois¹⁸ and of Indiana¹⁹ are the same in substance. In these states it is held that the

7. Revised Statutes 1909, § 1980.

8. *Carrol v. Interstate Rapid Transit Co.* (1891) 107 Mo. 653, 17 S. W. 889; *Rutledge v. Missouri Pacific Ry. Co.* (1894) 123 Mo. 121, 27 S. W. 327; *Lawyers' Cooperative Publishing Co. v. Gordon* (1903) 173 Mo. 139, 73 S. W. 155.

9. (1897) 72 Mo. App. 248.

10. (1905) 117 Mo. App. 295, 92 S. W. 1148.

11. (1906) 199 Mo. 304, 97 S. W. 928.

12. (1908) 218 Mo. 586, 117 S. W. 730, and cases cited.

13. Revised Statutes 1909, § 1900.

14. Revised Statutes 1909, § 2083.

15. Kansas General Statutes 1909, § 5615; Maine Revised Statutes 1908, c. 83, § 94; New York Code of Civil Procedure 1906, § 405; Wilson's Oklahoma Revised Statutes 1903, § 4216-4221; Page & Adams Ohio General Code 1910, § 11233; Shannon's Tennessee Code 1906, c. 127, § 12.

16. Arkansas Statutes 1884, § 4497.

17. Alabama Code 1896, § 2806.

18. Hurd's Illinois Revised Statutes 1903, c. 83, § 25.

19. Burns Indiana Annotated Statutes 1908, § 301.

purpose of such statutes is to make an exception to the general statutes of limitations; and that they are intended to reach only those cases where suit is brought and the merits of the action are not tried, and the period of limitation expires while the suit is pending. In accordance with this doctrine, LAMM, J.,²⁰ says: "A broad view of this section—" a view that takes in as well the remedy to be advanced as the mischief to be retarded . . . but goes to the weightier matter of the law—shows that it was in the legislative mind that a litigant should have a day in court—a trial on the merits of his cause. If the proceedings fell short of that, if the judgment was arrested, or if for plaintiff and reversed on error or appeal, or if some interlocutory matter supervened and thwarted a trial on the merits, then the prescribed period of the statute of limitations . . . should be extended for one year". It must be stated in this connection, however, that a judgment to be conclusive as an estoppel between the parties to a suit, need not have been a formal judgment upon a hearing of the issues; nor does it matter that the decision was rendered on a demurrer or upon a mere motion. If the merits were involved and adjudicated the decision is final.²¹

Upon any other interpretation of the statute, there would be no end of litigation, assuming, of, course, that the courts will continue the practice of simple reversal,²² for it is to be observed that the statute uses the words "from time to time;" and if a suit may be re-instituted after one reversal, why not after each subsequent reversal?

Tho, ordinarily, it seems, a judgment of reversal is only final when it also enters or directs the entry of a judgment which disposes of the case,²³ it must be concluded such statutes are not intended to affect the principle of *res judicata*, for where the appellate court reverses for causes going to the merits, and the reversal shows an intention to finally decide the case upon the merits, the judgment is

20. *Wetmore v. Crouch* (1905) 188 Mo. 647, 87 S. W. 954. To the same effect, *Roland v. Logan*, 18 Ala. 207; *Napier v. Foster*, 80 Ala. 379; *Little Rock, etc. Ry. Co. v. Mancees* (1887) 49 Ark. 248, 4 S. W. 778; *McAndrews v. Chicago, etc., Ry. Co.* (1908) 162 Fed. 856, 89 C. C. A. 546; *McKinney v. Springer* (1851) 3 Ind. 59, 63 (*semble*). In 19 Amer. & Eng. Encyc. of Law (2d. ed.) p. 282, it is said: "The original English statutes and most of the statutes in the United States provide for a new action where a judgment for the plaintiff is reversed on appeal or writ of error. But since these statutes have reference purely to the question of limitations, and are not intended to affect the rules of *res judicata*, manifestly the reversal must be on some ground not affecting or concluding the merits of the cause of action."

21. Revised Statutes 1899, § 4285, now Revised Statutes 1909, § 1900.

22. *Johnson v. United Rys. Co.* (1912) 243 Mo. 278, 147 S. W. 1077. Cf. *Spencer v. Watkins* (1909) 169 Fed. 379, 94 C. C. A. 659.

23. *Carroll v. Interstate Transit Co.* (1891) 107 Mo. 653, 17 S. W. 889; *Rutledge v. Missouri Pacific Ry. Co.* (1894) 123 Mo. 121, 24 S. W. 1053; *Keown v. St. Louis R. R. Co.* (1897) 141 Mo. 88, 41 S. W. 926.

24. *Stone v. Grand Lodge of United Workmen of Mo.* (1905) 117 Mo. App. 295, 92 S. W. 1143; *Atkinson v. Dixon* (1888) 96 Mo. 582, 10 S. W. 163; *Donnell v. Wright* (1906) 199 Mo. 304, 97 S. W. 928; *Smith v. Frankfeld* (1879) 77 N. Y. 414; *Smith v. Adams* (1889) 130 U. S. 167, 9 Sup. Ct. 566; *Spees v. Boggs* (1903) 204 Pa. St. 504, 54 Atl. 346.

taken to be a bar to a new action."²⁵ And the scarcity of cases on the question indicates that this, with practical unanimity, has been the understanding of the bar for over one hundred years.²⁶ But there is the language intimating the contrary in *Estes v. Fry*,²⁷ where Marshall, J., delivering the opinion of the court said, concerning the application of this statute: "The one year here allowed means one year after judgment is entered for a nonsuit, in arrest, or for a reversal, and this is true whether such judgment is entered in the trial or appellate court".

No decisive reason has been advanced why the privilege of commencing a new action within one year should not equally apply to all of the situations mentioned in the statute. It is submitted that a literal interpretation of the statute would admit of a new action within one year after a judgment merely of reversal. The wording of the statute is so clear that it would seem that any mischief which might result from its provisions should be avoided by the legislature. The question might be obviated by an addition to the statute providing for the new action where a case has been disposed of *otherwise than on the merits*. This step seems to have been taken by the Missouri court without the interference of the legislature, and it is improbable that the decisions will be disturbed. All difficulty can be avoided if the appellate courts will proceed to enter or direct a judgment at the time of reversal. On the principle of *stare decisis* the new action would probably be disposed of in accordance with the disposition made in the former case; so that the final result would seldom be different even if the new action were entertained.

J. C. S.

TRESPASS BY CHICKENS—EFFECT OF INCLOSURE ACT. *EVANS v. McLAINE*.¹ By the early common law of England the owner of domestic animals was bound to confine them to his own close and was liable, irrespective of negligence, for their trespasses upon the land of another whether such land was fenced or not.² This rule had an obvious foundation in public policy in thickly populated communities devoted to agriculture. One exception to the rule was that in the absence of negligence and provided he removed them in a reasonable time, the owner of animals was not liable for their trespasses while being driven along

25. *Strothman v. St. Louis, etc., Ry. Co.* (1910) 228 Mo. 154, 128 S. W. 187; *Ginocchio v. Illinois Central Ry. Co.* (1915) 175 S. W. 196; *Johnson v. United Rys. Co.* (1912) 243 Mo. 278, 147 S. W. 1077. *Of. Rutledge v. Mo. Pac. Ry. Co.* (1894) 123 Mo. 121, 24 S. W. 1053; *United Shoe Machinery Co. v. Ramiose* (1910) 231 Mo. 508, 132 S. W. 1183.

26. *Ginocchio v. Illinois, etc., Ry. Co.* (1915) 175 S. W. 196, 197. Revised Statutes 1909, § 1900, having its origin in 1807. *Vide* Territorial Laws, p. 144, § 2.

27. (1901) 166 Mo. 70, 81, 65 S. W. 741.

1. (1915) 175 S. W. 294.

2. 3 Blackstone, Commentaries (Cooley's 3d ed.) p. 211; Cooley, Torts (2d ed.) p. 397.

the highway.³ The common law principle applied to adjoining land-owners unless by statute, prescription, or agreement an obligation to maintain a partition fence had been imposed.⁴ All domestic animals subject to ownership were included within the operation of the common law rule, except dogs and cats,⁵ and while no cases have been found in which an action was brought for the trespass of chickens, these presumably fall within the rule as to domestic animals. Blackstone speaks of domestic animals as being "horses, kine, sheep, poultry and the like";⁶ and chickens come within his definition of *domitae naturae* or "such animals as we generally see tame and are seldom if ever found wandering at large".⁷ Then there is a *dictum* by WILLIAMS, J., in *Cox v. Burbridge*⁸ that "if a man's cattle, or sheep, or poultry stray into his neighbor's land or garden, and do such damage as might ordinarily be expected to be done by things of that sort, the owner is liable to his neighbor for the consequences". *Dicta* in two American cases⁹ support this conclusion as to trespasses by chickens.

When one's premises were invaded by the animals of another, the landowner at common law could drive them from his close by the use of reasonable means, but was liable to their owner for injuries inflicted upon them by the use of unnecessary force or means in expelling them.¹⁰ He might also distrain them *damage feasant* until compensated for the damage sustained by their trespass.¹¹

The common law rule as to the liability of the owner of animals for their trespasses without regard to negligence still prevails in England,¹² and in a few states in this country. In a number of the states, however, the principle has been declared either inapplicable or abrogated by the fencing laws.¹³ The Missouri statute of inclosures was first enacted in 1808,¹⁴ providing that all fields should be inclosed with fences of certain specifications, and making the proprietor of certain animals liable for damages occasioned by their trespass thru such lawful fence. This is substantially our present statute of inclosures.¹⁵ The Missouri courts have held that this act abrogated the common law principle and that owners of certain domestic animals need not fence them in and are not liable for their trespass upon either unenclosed

3. *Tillett v. Ward* (1882) 10 Q. B. D. 17.

4. Cooley, Torts, (2d ed.) p. 398; Pollock, Torts (9th ed.) p. 509.

5. *Read v. Edwards* (1864) 17 C. B. (N. S.) 224, 260.

6. 2 Blackstone, Commentaries (Cooley's 3d ed.) p. 387.

7. 2 Blackstone, Commentaries (Cooley's 3d ed.) p. 390.

8. (1863) 13 C. B. (N. S.) 430, 437.

9. *Johnson v. Patterson* (1840) 14 Conn. 1; *Clark v. Kellher* (1871) 107 Mass. 406.

10. *Heald v. Grier* (1857) 12 Mo. App. 556.

11. *State v. Neal* (1897) 120 N. C. 613 (chickens).

12. *Clark & Lindsell, Torts* (6th ed.) p. 479.

13. For the law of the various states upon this question, see Ingham, *Animals*, §§ 70, 71.

14. *Laws of Louisiana Territory*, p. 276.

15. *Revised Statutes* 1909, §§ 6454, 6455, 6456.

lands¹⁶ or land not fenced according to statutory requirements.¹⁷ The leading case upon this subject is *Gorman v. Pacific Railroad*¹⁸ in which cattle belonging to the plaintiff went upon the defendant's right of way not fenced according to the statute, and were killed by the defendant's engine. The court said: "It has always been our understanding as to law in this state that our statute concerning inclosures entirely abrogated that principle of the common law which exempted the proprietor of land from the obligation of fencing it and imposed on the owner of animals the duty of confining them to his own premises"; the defendant was held liable on the ground of negligence toward the trespassing cattle. In the Missouri cases the abrogation of the common law rule has always been assigned to the statute of inclosures,¹⁹ and it does not, as in some states, rest upon judicial determination independently of statute.²⁰

The first statute of inclosures provided for the liability of the owner of "any horse, gelding, mare, colt, mule or ass, sheep, lamb, goat, kid, or cattle . . . or hog, shote, or pig"²¹ for the trespass of such animal thru a lawful fence. In 1835,²² "horse, cattle, or other stock . . . or hog" was substituted for the long list of animals in the earlier law, and in 1889²³ hogs were dropped, leaving the section as it now is, viz., the owner of "horses, cattle, or other stock" will be liable for their trespass thru a statutory fence.²⁴ In 1885, to the specification of the fence was added a requirement that such fence must be sufficient "to resist horses, cattle, swine and like stock", and the act provided that in districts where swine are restrained from running at large, a fence of other dimensions would be sufficient.²⁵ While courts have defined "stock" as "domestic animals or beasts usually raised on a farm,"²⁶ which would include chickens, in cases involving the interpretation of the word they have applied the term only to ani-

16. *Kerts v. Dolde* (1879) 7 Mo. App. 564.

17. *Mann v. Williamson* (1879) 70 Mo. 661; *Fenton v. Montgomery* (1885) 19 Mo. App. 156.

18. (1858) 26 Mo. 441. At that time, 1858, the railroads were under no greater duty to fence their land than any other proprietor. In *Clark v. Hannibal & St. Joseph Ry.* (1865) 36 Mo. 202, 220, it was said that apart from the statute of inclosures the owners of cattle would be liable for damages caused to trains consequent to striking trespassing cattle. See also *Hannibal & St. Joseph Ry. v. Kenny* (1867) 41 Mo. 271. Our present statute imposing an absolute duty of fencing upon railway companies, Revised Statutes 1909, § 3145, was enacted in 1877, and is not affected by the adoption of the stock law, Revised Statutes 1909, § 777.

19. See *Heuld v. Grier* (1857) 12 Mo. App. 446; *Clark v. Hannibal & St. Joseph Ry.* (1865) 36 Mo. 202; *McLean v. Berkshille* (1907) 123 Mo. App. 647, 652.

20. *Seeley v. Peters* (1848) 10 Ill. 130; *Buford v. Houts* (1890) 133 U. S. 320; *Comerford v. Duprey* (1861) 17 Cal. 308.

21. Laws of Louisiana Territory, p. 276, § 2.

22. Revised Statutes 1835, p. 311.

23. Revised Statutes 1889, § 5034.

24. Revised Statutes 1909, § 6456.

25. Laws of 1885, p. 166. Revised Statutes 1909, § 6455.

26. The definition is from Webster's Dictionary. *State v. Clark* (1884) 65 Iowa 336, 21 N. W. 666; *Inman v. Chicago, Milwaukee & St. Paul Ry. Co.* (1883) 60 Iowa 459, 15 N. W. 286.

mals popularly considered as coming within it, viz., horses," mules, asses, cattle," hogs, sheep or goats, but not poultry or other fowls. As no law has been passed expressly adding to or taking from the list of animals against which one is bound to fence, the changed expression is probably due only to the simplification processes used in revising the statutes from time to time. "Horses, cattle and other stock", then would include only the animals enumerated in the original statute. Since chickens or other fowls were not named in the original inclosure statute and are not now comprehended in the term "stock", it follows that *by the statute of inclosures* the trespass of chickens has never been actionable in this state. The facts that a statutory fence must be sufficient "to resist horses, cattle, swine, and like stock",²⁹ and that chickens cannot be kept off one's land by the statutory fence, support this conclusion.

While the courts have stated *obiter* that the common law principle as to animals generally is not in force here, a distinction might have been made as to the animals included in its abrogation. That is, as the abrogation of the common law is solely statutory, the landowner should be required to fence only against the animals named in the statute and properly restrainable by a statutory fence. In *Canefox v. Crenshaw*,³⁰ the defendant was held not liable for killing the plaintiff's vicious buffalo which had come upon his land, and the court said that "if in the construction of our statute of inclosures, we hold that a party must fence his field with a lawful fence before he can complain of the damage of others, we must of course limit this immunity to the domestic animals enumerated in the statute against which he is bound to fence". Until the principal case was decided, the only cases decided by the courts have been those involving the trespasses of animals included in the inclosure statute and there is no intimation in the cases, with the exception of the dictum in *Canefox v. Crenshaw* noted, that the common law might still be in force as to animals not named in the statute.³¹

27. *Contra, Dudley v. Deming* (1867) 34 Conn. 169.

28. "Cattle" includes all domestic quadrupeds. *State v. Law* (1883) 80 Mo. 241; *State v. Prater* (1908) 130 Mo. App. 848. The term cattle has been held to include hogs, *State v. Pruett* (1895) 61 Mo. App. 156; and goats, *State v. Groves* (1896) 119 N. C. 822; 25 S. E. 819; and sheep. See *Jackson v. Fulton* (1901) 87 Mo. App. 228.

29. Revised Statutes 1909, § 6455.

30. (1857) 24 Mo. 199, 203.

31. In *Leach v. Lynch* (1910) 144 Mo. App. 391, it was stated that in counties where goats were not restrained from running at large under Revised Statutes 1909, Art. V., c. 6, such an animal was not a trespasser. The court said that, "domestic animals are commoners and have a right to run at large," but the cases cited in support of the dictum are those involving the trespass of animals named in the statute of inclosures. As the land upon which the goat trespassed was not enclosed by a fence of statutory requirements, and as a goat is included in the term "stock", *State v. Groves* (1896) 119 N. C. 822, 25 S. E. 819, for whose trespasses one cannot recover unless he has a lawful fence, the case falls within the statute of inclosures and, hence, does not decide that the common law rule applies to animals not named in the inclosure law, altho the dictum is to that effect.

But our statute of inclosures has been held to apply only to outside fences," and where the lands of adjoining proprietors are enclosed by a continuous outside fence, or as it is usually stated, the adjoining lands are under a common inclosure, the common law is still in force in the absence of the erection and maintenance of a division fence, under the statute" or a contract." Thus in *Gillespie v. Hendren*," where the lands of the plaintiff and defendant, not separated by a partition fence, were surrounded by the fences of adjoining proprietors, it was held that the plaintiff could recover rent for the grazing of the defendant's cattle which passed from his land to the plaintiff's. So if A's cattle trespass on the adjoining land of B, not directly from the premises of A but by way of the highway or land of C, A is not liable to B unless the animals broke thru B's lawful fence; but if they pass immediately from A's land to B's, A is liable for their trespass unless the lands were divided by a lawful fence erected according to statute or agreement.

As the abrogation of the common law liability of the owner of certain animals for their trespasses by the statute of inclosures leaves a question as to the liability of owners of animals not named therein, so the abrogation of the common law as to adjoining proprietors in a common inclosure by the laws regarding division fences raises a similar question. No cases have been found on this point but it is very likely that when the case arises, the court will reach a result as to inside fences similar to that reached regarding outside fences.

In 1883 the statute was enacted allowing local option on the subject of restraining the running at large of animals of the species of horse, mule, ass, cattle, swine, sheep or goat,"—or any one of these". Where the option has been exercised, it is unlawful for the owners of any animals so restrained to allow them to run at large and landowners need not fence against them. Tho analogous to the common law," the statute does not restore the common law and one suing for damage occasioned by the trespass must sue under the statute;" and the rights and duties of adjoining landowners within a common inclosure are not affected by the adoption of the stock law but remain as at common law. The liability of the owner of animals which trespass while being

32. *Reddick v. Newburn* (1882) 76 Mo. 423.

33. Revised Statutes 1909, c. 47.

34. *Jackson v. Fulton* (1901) 87 Mo. App. 228.

35. (1903) 98 Mo. App. 622.

36. Where the act has been adopted, geese are to be restrained. Revised Statutes 1909, § 790.

37. Revised Statutes 1909, c. 6, art. V. A similar act of 1873 was declared unconstitutional in *Lammert v. Lidenell* (1876) 62 Mo. 188, on the ground that it delegated a law-making power to the people. This difficulty is avoided in the present law by declaring the provisions of the act suspended until the voters of any one county or any five townships in any one county have accepted the same at a special election.

38. *Rinehart v. Kansas City Southern Ry. Co.* (1904) 126 Mo. App. 446, 451, 80 S. W. 910.

39. *Jackson v. Fulton* (1901) 87 Mo. App. 228.

driven along a highway is probably the same today under the statute now in force⁴⁰ as by the common law.⁴¹

In *Evans v. McLain*,⁴² the plaintiff, an adjacent landowner to the defendant, sued for damages for the trespass of chickens belonging to the latter which came on the former's land and damaged his garden and crops. There was no division fence between the premises of the parties, nor were the lands of the two adjoining owners surrounded by a common outside fence.⁴³ The court affirmed a judgment of the trial court sustaining a demurrer to the petition and held the defendant not liable for the depredations of his chickens. This is the first case found in this state which holds the owner of animals not named in the statute of inclosures not liable for their trespass. The principal ground of the decision is that the common law liability of the owner of animals for their trespasses is inapplicable because it is of a nature local to England and not sufficiently general to be in force in this state.⁴⁴ But the cases cited in support of this holding are *Gorman v. Pacific Railroad*,⁴⁵ *Hill v. Missouri Pacific Ry. Co.*,⁴⁶ *McPheeters v. Hannibal & St Joseph Ry. Co.*⁴⁷ and *McLean v. Berkable*,⁴⁸ all of which involve trespass by animals included within the inclosure and division fence laws—"horses, cattle, or other stock". Thus while the effect of the decision is the application of the inclosure statute to animals not enumerated therein, the case does not expressly so hold, and the decision was placed on another ground, viz., the inapplicability of the common law rule in general to conditions in Missouri. Other grounds of the decision are the absence of precedent and the legislative interpretation of the law as to liability for the trespass of chickens;⁴⁹ but these reasons do not seem conclusive⁵⁰ and would not have prevented a decision that the owner of chickens was liable for their trespasses on the ground that the inclosure law abrogated the common law only as to animals enumerated in the statute.

In the beginning of the opinion, STURGES, J., states the question of the case to be "whether under the laws of this state, the owner of

40. Revised Statutes 1909, § 778.

41. 7 Law Series, Missouri Bulletin, p. 27, note 94.

42. (1915) 175 S. W. 294.

43. This does not appear from the record but the court says cases involving the liability of such adjacent landowners. *O'Reilly v. Die* (1890) 41 Mo. App. 184; *Growney v. Wabash Ry.* (1903) 102 Mo. App. 442, are not applicable.

44. Revised Statutes 1909, § 8047.

45. (1858) 28 Mo. 441.

46. (1892) 49 Mo. App. 520.

47. (1869) 45 Mo. 22.

48. (1907) 123 Mo. App. 647.

49. This legislative interpretation that there was no liability apart from statute being evidenced by the statutes providing for the restraint of geese where the stock law has been adopted, Revised Statutes 1909, § 790, and allowing cities and towns to prohibit by ordinance the running at large of chickens. Revised Statutes 1909, §§ 9229, 9374.

50. *Paresich v. New England Life Ins. Co.* (1905) 122 Ga. 190, 50 S. E. 68; *Ross v. Kansas City, etc. Ry.* (1892) 111 Mo. 18, 25.

domestic fowls must so restrain them as to prevent their trespassing upon the land of another or must such landowner protect his land against such trespass or suffer the incidental injury without redress". The court answered the first part of this question in the negative, but it does not say whether the landowner must "suffer the incidental injury without redress". If he cannot recover from the owner the damage sustained, what are the rights of the proprietor of land which has been damaged by his neighbor's chickens?

While there were no cases concerning trespassing chickens in this state before the principal case was decided, presumably they would fall within the rule of the common law approved in *Heald v. Grier*⁵¹ that the landowner may still drive trespassing animals from his land by the use of reasonable means, but is liable to the animal's owner for any injury resulting to it from the use of unnecessary force. It is immaterial that an injury so inflicted was sustained after the animal left the land from which it was driven.⁵² There is no right in this state to kill or injure a trespassing animal⁵³ except in extreme cases, as where a vicious buffalo had broken thru the defendant's fence and was about to injure defendant's cattle;⁵⁴ but the decision would have been otherwise if the property endangered had been of trivial value, or the defendant had had other means of preserving his property. Certainly trespassing animals cannot be killed merely for being on the land,⁵⁵ and it is very doubtful whether the killing of chickens would ever be held justifiable. In *Clark v. Kellher*,⁵⁶ the defendant was held liable for killing the plaintiff's chickens which habitually trespassed on the defendant's land and built nests thereon; and in two Illinois cases,⁵⁷ the defendants were held liable for killing turkeys belonging to the plaintiffs, tho the turkeys were causing apparently trivial damage to the crops of the defendants. The same is true of poisoning chickens.⁵⁸ Notice to the owner of the trespassing fowls of intent to poison them unless they are restrained is no defense in a suit for killing or poisoning.⁵⁹

It has been held that the common law right to distrain *damage feasant* does not exist in this state,⁶⁰ its abrogation being attributed

51. (1857) 12 Mo. App. 556.

52. *Totten v. Cole* (1882) 33 Mo. 138.

53. *State v. Prater* (1908) 130 Mo. App. 348; *State v. Silbaugh* (1913) 250 Mo. 308. The inclosure act of 1808 allowed the owner of land to kill certain animals trespassing thru a lawful fence for the third time. This provision continued in force until 1877.

54. *Canefoa v. Crenshaw* (1857) 24 Mo. 199.

55. *Penion v. Biesel* (1879) 80 Mo. App. 135 (dog).

56. (1871) 107 Mass. 406.

57. *Ries v. Stratton* (1887) 23 Ill. App. 314; *Hamilton v. Sampson* (1913) 184 Ill. App. 316.

58. *Johnson v. Patterson* (1840) 14 Conn. 1; and of poisoning geese. *Matthews v. Fiestel* (1853) 2 E. D. Smith (N. Y.) 90.

59. *Johnson v. Patterson* (1840) 14 Conn. 1; *Clark v. Kellher* (1871) 107 Mass. 406.

60. *Storm v. White* (1886) 28 Mo. App. 31; *Mackler v. Schuster* (1897) 68 Mo. App. 670; *Harris v. Brummell* (1898) 74 Mo. App. 433.

to the statutory provisions allowing the impounding of animals which trespass thru a lawful fence.⁶¹ Again the question arises, did this abrogation extend only as to animals named in the statute? As all the cases found on this point involve the trespasses of animals named in the statute, it might be held that so far as trespass thru outside fences is concerned, the owner of land can impound trespassing chickens. But if the decision in the principal case is that the statute of inclosures abrogated the common law as to liability for the trespass of all animals, then the common law right of distraint is abrogated as to chickens, for such right does not exist unless the trespass be actionable.⁶²

As the common law is in force between the owners of adjoining lands, the right of distraint *damage feasant* exists as at common law,⁶³ and hence, in the absence of a lawful fence according to statute or agreement, trespassing chickens can be impounded. And it would seem that the establishment and maintenance of such a fence would not affect the right of distraint unless the laws concerning division fences abrogate the common law as to *all* animals.

The adoption of the stock law has been held not to change the rights of adjoining landowners to distrain trespassing animals,⁶⁴ and since it does not restore the common law,⁶⁵ and the law contains no provisions as to restraint of chickens, the rights of the landowner damaged by the trespass of chickens thru an outside fence remain the same as before its adoption.

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61. Revised Statutes 1909, § 6456. See *Orocker v. Mann* (1834) 3 Mo. 472.

62. Clark & Lindsell, *Torts* (6th ed.) p. 343.

63. *Gilmore v. Harp* (1901) 92 Mo. App. 77; *Jones v. Habberman* (1902) 94 Mo. App. 1.

64. *Jones v. Habberman* (1902) 94 Mo. App. 1.

65. *Rinehart v. Kansas City Southern Ry. Co.* (1904) 126 Mo. App. 446, 451. 80 S. W. 910.

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SOME ASPECTS OF THE STATUS OF CHILDREN IN MISSOURI

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NOTES ON RECENT MISSOURI CASES



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SOME ASPECTS OF THE STATUS OF CHILDREN IN MISSOURI¹

Every individual occupies in the law a certain position or relation with reference to other individuals, which legal position or relation may be called his status. From his status the law determines "his capacity for the acquisition and exercise of legal rights and for the performance of legal acts."² Since it is a legal relation, status is created by law and not by nature. In some instances the law has created a status in the absence of any natural relationship between the parties affected.³ In other instances a natural relation, such as that of parent and child, has been made the basis for the creation of a status, tho this result does not always follow merely because such a natural relation exists.

In two recent decisions of the Supreme Court of Missouri, *Drake v. Milton Hospital Association*⁴ and *Lindsley v. Patterson*,⁵ some of the problems arising in connection with the position of illegitimate and adopted children have been discussed. This study will deal with the various kinds of status of children in Missouri law, the condition under which each may come into existence, and the rights of inheritance which flow from each of them.

I LEGITIMACY

Children are either natural or adopted. Natural children are either legitimate or illegitimate. A legitimate child may be either one born such or one who becomes such after its birth.

1. This study has been undertaken in connection with the work of the Children's Code Commission appointed by the Governor in 1915, to recommend to the General Assembly a complete code of laws relating to children.

2. Dicey, *Conflict of Laws* (2d ed.) p. 458. See also *Niboyet v. Niboyet* (1878) 4 Prob. Div. 1, 11; *Minor*, *Conflict of Laws*, § 68.

3. Tiffany, *Persons*, p. 213.

4. (1915) 178 S. W. 462.

5. (1915) 177 S. W. 826.

1. *Children born legitimate.* In Missouri a legitimate child has been held to be "one born in lawful wedlock, or of a widow within ten months after the death of her husband, or born before the marriage of its parents who afterwards marry and receives the recognition of its father."⁶ This probably does not mean that a child born of a widow within ten months after the death of her husband is necessarily legitimate. It may not, in fact, have been begotten until after the husband's death. Perhaps a more accurate phrasing of the first part of the definition would be this: a legitimate child is one born or begotten during the lawful wedlock of its parents. Only such children were legitimate at common law.⁷ Children born of parents unmarried at the time of birth were illegitimate at common law and remained so notwithstanding the subsequent marriage of their parents. Altho under both the ecclesiastical and the civil law children were legitimated by the subsequent marriage of their parents, the common law has persisted in its refusal to recognize the possibility of legitimation under such circumstances.⁸ The common law doctrine has, however, been superseded in many states by statutes which legitimate children born out of wedlock either upon the marriage of their parents, or upon such marriage and recognition by the father.⁹

2. *Legitimation by subsequent marriage and recognition.* The Missouri statute provides that "if a man, having by a woman a child or children, shall afterwards intermarry with her and shall recognize such child or children to be his, they shall thereby be legitimated."¹⁰ It will be seen that the illegitimate

6. *Gates v. Seibert* (1900) 157 Mo. 254, 272.

7. 2 Kent, Commentaries (13th ed.) 210.

8. "*Quod nolunt leges Angliae mutare, quae huc usque usitatae sunt et approbatae.*" Statute of Merton (1236) 20 Hen. III, c. 9. However, legitimation was possible by act of Parliament. 2 Kent, Commentaries (13th ed.) *209. Special acts for the legitimation or adoption of children are prohibited in Missouri. Constitution of 1875, art. 4, § 53 (9).

9. 1 Stimson, American Statute Law, § 6631.

10. Revised Statutes 1909, § 341. This section first appears in an act regulating descents and distribution, passed January 21, 1815, as follows: "And when a man shall have one or more children by a woman, and shall afterwards intermarry with such woman, such child or children, if recognized by him shall be thereby legitimated, and

child can become the legitimate child of its father only upon the marriage of the father and mother followed by recognition by the father. Three things must therefore be established: (1) paternity;¹¹ (2) a marriage of the parents; (3) recognition by the father. Should there be a failure to show any one of these, there is no legitimation.

Proof of the paternity of a child born or begotten in lawful wedlock is greatly aided by the presumption of legitimacy. Such a child is presumed to be the legitimate child of its mother's husband, unless there is evidence to the contrary. It was formerly held in England that the presumption could not be overthrown except by proof that the husband was "beyond the four seas," i. e., outside of the jurisdiction of the king, during the whole time in which the child by possibility might have been begotten.¹² But it has recently been held in England that "if the husband could, from circumstances of time, place and health have had nuptial intercourse with his wife, and there be no evidence to prove that he did not have such intercourse, he must be considered the father of her child, even if she has committed adultery with one, two or twenty other men."¹³ Evidence as to the husband's impotency will rebut the presumption, and so will evidence as to lack of opportunity of access; but such evidence must be strong and satisfactory.¹⁴

In the United States the presumption exists but is not conclusive,¹⁵ and the extent to which it is rebuttable is not certain.¹⁶

capable of inheriting." Territorial Laws, p. 402, § 16. The words "and capable of inheriting" were omitted in Revised Statutes 1825, p. 328. In the revision of 1835, the section appears in the Chapter on Descents and Distribution in the exact words now used. Revised Statutes 1835, p. 223, § 9.

11. *Mooney v. Mooney* (1912) 244 Mo. 372; *In re Reid's Estate* (Minn., 1915) 153 N. W. 593. But see *contra*, *Haddon v. Crawford* (Ind. App. Ct., 1912) 97 N. E. 811.

12. 4 Wigmore, Evidence, § 2527; Lawson, Presumptive Evidence, § 108 *et seq.*

13. *Gordon v. Gordon* (1903) Probate 141, quoting Nicolas, *Adulterine Bastardy*, p. 186. *Canaan v. Avery* (1904) 72 N. H. 59, accord.

14. 2 Halsbury, Laws of England, 427.

15. *Bunel v. O'Day* (1903) 125 Fed. 303, 317. *Contra*, *In re Henry's Estate* (Iowa, 1914) 149 N. W. 605.

16. 4 Wigmore, Evidence, § 2527. Rebutting evidence must satisfy beyond a reasonable doubt. *State v. Shaw* (Vt., 1915) 94 Atl. 434. See also, *Cave v. Cave* (S. C., 1915) 85 S. E. 244.

It can be rebutted by proof of non-access or of impotency.¹⁷ Suppose the child is born so soon after marriage that it could not possibly have been begotten during the marriage, does the presumption of legitimacy obtain? It seems settled that it does,¹⁸ and this may be justified as a measure for protecting the child, but the authorities are divided as to the weight of evidence necessary to rebut the presumption. In *Dennison v. Page*,¹⁹ it was said that the presumption was not even weakened by the fact that conception had taken place prior to marriage and that if the man who became the husband had access prior to the marriage, the child is conclusively proved to be his. By access, the court probably meant sexual intercourse. Absence of sexual intercourse must be shown clearly. But in *Wright v. Hicks*,²⁰ the court held that a difference should be made between post-nuptial and ante-nuptial conception, and that much slighter proof may rebut the presumption of legitimacy if the conception is ante-nuptial. In the recent case of *Jackson v. Thornton*,²¹ it was held that a mere preponderance of evidence is not sufficient to rebut the presumption.²²

17. *Drake v. Milton Hospital Assn.* (1915) 178 S. W. 462; but in *Bunel v. O'Day* (1903) 125 Fed. 303, the court intimates that if the absence of sexual intercourse is shown by indubitable evidence it is immaterial that there was a possibility of access. But in view of the rule of evidence that neither husband or wife may testify to the fact that no sexual intercourse between them had taken place, *People v. Case* (1912) 171 Mich. 282, it would seem to be practically impossible to prove an absence of sexual intercourse where there is possibility of access.

18. *Jackson v. Thornton* (Tenn., 1915) 179 S. W. 384; *Wallace v. Wallace* (1908) 137 Iowa 37; *McCulloch v. McCulloch* (1888) 69 Tex. 682; *Wilson v. Babb* (1882) 18 S. C. 59; *Dennison v. Page* (1857) 29 Pa. 420; *Wright v. Hicks* (1854) 15 Ga. 160. In *Zachmann v. Zachmann* (1903) 201 Ill. 380, the child, tho born in wedlock, was begotten during a former marriage and was held to be the legitimate child of the second husband.

19. (1857) 29 Pa. 420.

20. (1854) 15 Ga. 160.

21. (Tenn., 1915) 179 S. W. 384.

22. The husband and wife are both incapable of testifying as to sexual intercourse, even tho the conception be ante-nuptial; and their declarations as to this are also inadmissible. *Wallace v. Wallace* (1908) 137 Ia. 37; *Dennison v. Page* (1857) 29 Pa. 420. But the admissions of the wife as to actual intercourse before marriage with men other than her husband are admissible in a divorce proceeding based upon her

A man's recognition of a child as his own is some evidence of parentage.²³ In *Adger v. Ackerman*,²⁴ a case involving the construction of the Missouri statute, Thayer, J., in a concurring opinion held that "the legislature intended to give acts of recognition the effect of evidence of a very decisive character." He found it unnecessary to decide that recognition was conclusive evidence of paternity, but held that it placed the child so recognized "in the same favorable position as one born during wedlock" and "it can only be rendered a bastard, after such recognition, by the same kind of proof which is required to overturn the legitimacy of a child born in the course of wedlock; and it is entitled to the benefit of the same presumption." This conclusion was approved by the Supreme Court of Missouri in *Breidenstein v. Bertram*²⁵ and in *Drake v. Milton Hospital Association*.²⁶ In the latter case, it was held that altho there was no direct evidence tending to show that the mother of the child and the man whom she afterwards married were acquainted at the time when the child must have been begotten, yet as they lived in the same city there was opportunity for access, and as the child after recognition stood in the same position as a child born in lawful wedlock and was entitled to the same presumption, the presumption as to its paternity was not rebutted by lack of such direct evidence of acquaintanceship. However, the presumption of paternity created by recognition may be rebutted by proof of the impotency of the man and possibly by any evidence that it was otherwise impossible for him to have been the father of the child.²⁷

The parents of the child must marry before the child can be legitimated by recognition and this marriage must be a valid marriage. If either party has a husband or wife living at the

pregnancy at the time of marriage. *Wallace v. Wallace*, *supra*. It was held in *Wright v. Hicks* (1854) 15 Ga. 160, 171, that declarations of husband and wife were admissible after death, but that neither could testify during life, nor could their declarations then be used.

23. *Stein's Admr. v. Stein* (Ky., 1908) 106 S. W. 860.

24. (1902) 115 Fed. 124, 136.

25. (1906) 198 Mo. 328.

26. (1915) 178 S. W. 462.

27. *Drake v. Milton Hospital Assn.* (1915) 178 S. W. 462.

time of the marriage,²⁸ or if the marriage is void because one party is white and the other black,²⁹ children previously born are not legitimated. A ceremony is not essential to the validity of a Missouri marriage. Common law marriages are as valid as those which are ceremonial;³⁰ but in order to constitute a valid common law marriage, it must be shown that there was cohabitation with an intent to marry and not merely to indulge in casual sexual intercourse.³¹ In all of the cases in Missouri involving the legitimation of children by the subsequent marriage of their parents and recognition by the father, the marriage of the parents seems to have been ceremonial. Probably no distinction would be taken between a ceremonial marriage and one valid at common law in determining whether legitimation results.

The circumstances constituting or evidencing recognition by the father are too varied to be stated in detail with any degree of completeness. Should the natural father call the child "daughter," or have her baptized in his name, or give her away in marriage, such conduct is evidence of recognition.³² In general, any word or act which shows that the husband accepted the child or held it out as his own offspring evidences recognition. The Missouri statute does not require that recognition be in writing, nor is any formality necessary.³³

Drake v. Milton Hospital Association,³⁴ recently decided by the Missouri Supreme Court, raises an interesting and important question. Can adulterine bastards, *i. e.*, children born or begotten when one of the parents was married to some one else not the father or mother of the child, be legitimated by sub-

28. *Adams v. Adams* (1891) 154 Mass. 290; *Olmsted v. Olmsted* (1908) 190 N. Y. 459.

29. *Greenhow v. James* (1885) 80 Va. 636.

30. *Bishop v. Brittain Investment Co.* (1910) 229 Mo. 699.

31. *Nelson v. Jones* (1912) 245 Mo. 579; *Buchanan v. Harvey* (1864) 35 Mo. 276.

32. *Drake v. Milton Hospital Assn.* (1915) 178 S. W. 462.

33. In Michigan, Howell's Annotated Statutes (2d ed.) § 10962, recognition must be in writing acknowledged and executed as a deed and recorded in the office of the probate judge. A general, notorious, or written recognition is necessary in Kansas. Kansas General Statutes 1901, § 254.

34. (1915) 178 S. W. 462.

sequent marriage and recognition? Such illegitimate children can not be so legitimated under the law of Scotland,³⁵ nor under the Roman-Dutch law nor under the civil codes of Belgium, Holland, Spain, Portugal or Italy.³⁶ By the French Civil Code, adulterine bastards may be legitimated by subsequent marriage only when born more than three hundred days after the date of an order authorizing separate residence of the first husband and his wife, the mother of the child, in an action which results in a decree of separation or divorce; but a child born during marriage may be legitimated by subsequent marriage of the wife with the adulterer if the first husband disavows it.³⁷ In *Drake v. Milton Hospital Association*,³⁸ the statement of facts shows that the supposed natural father of the child was married at the time the child was born. The question seems not to have been specifically considered by the court, which, however, held that the subsequent marriage of the natural father to the mother of the child after the death of the natural father's first wife, followed by recognition by the father legitimated the child. The fact that the father's marriage to his first wife was a slave marriage somewhat lessens the value of the case as a precedent. It is not clear whether the mother of the child was married at the time of its birth.

Decisions in the United States involving this question are not numerous. In Louisiana, illegitimate children born of an adulterous intercourse are not legitimated by subsequent marriage.³⁹ In Kentucky, under a statute similar to the one in Missouri, it has been held that illegitimate children born while the father was married to a woman not their mother were not legitimated by the subsequent lawful marriage of their parents and recognition by the father.⁴⁰ In Maryland⁴¹ and in Illinois⁴² a contrary conclusion has been reached. In the Kentucky,

35. Erskine, Principles (21st ed.) p. 104.

36. Burge, Colonial and Foreign Law (new ed.) p. 350, 357, note q.

37. Burge, Colonial and Foreign Law (new ed.) p. 352.

38. (1915) 178 S. W. 462.

39. *Fletcher's Succession* (1856) 11 La. Ann. 59.

40. *Sams v. Sams* (1887) 85 Ky. 396; *Hall v. Hall* (1904) 82 S. W.

300.

41. *Hawbecker v. Hawbecker* (1875) 43 Md. 516.

42. *Miller v. Pennington* (1905) 218 Ill. 220.

Maryland and Illinois cases the father was married and the mother unmarried at the time the child was begotten. In *Ives v. McNicoll*,⁴³ at the time the child was born the mother was married to a man not the natural father of the child and it was held that the child was legitimated by the subsequent lawful marriage of its parents and recognition by its father. It was found as a fact that the mother and her first husband had not lived together for about six years before the child was born. Accordingly, it cannot be said that *Ives v. McNicoll* decides anything more than that if the circumstances show that it was impossible for the first husband to have been the father of the child, the child may be legitimated by the subsequent lawful marriage of its parents and recognition by its natural father.⁴⁴

If, however, the first husband could possibly have been the father of the child, does it then follow that a subsequent lawful marriage between the mother and a man who may have been the father of the child will legitimate the child if the second husband recognizes it as his own? The difficulty of establishing with reasonable certainty the actual paternity of the child may possibly make it desirable that there should be some distinction.⁴⁵ It is doubtful, however, whether such a distinction can be drawn under the statute which provides that legitimation results from the subsequent marriage of a man with the mother of his children, followed by recognition by him, without restricting it to instances in which the mother of the children was unmarried at the time they were born, or if married, was not cohabiting with her husband. If some such distinction is not made, however, a child begotten at a time when there was a possibility of access by its mother's first husband, and hence presumptively the legitimate child of such husband and as such entitled to inherit as his heir, may be deprived of its inheritance by the marriage of its

43. (1899) 59 Ohio St. 402.

44. *Vide ante*, p. 6, note 18.

45. There is a suggestion as to such a distinction in *Stones v. Keeling* (Va., 1804) 5 Call 143, 148. A recognition even in writing by the mother's second husband will not overcome the presumption of legitimacy if the child was born in lawful wedlock, unless the non-access of the husband was established by the clearest and most conclusive evidence. *Bethany Hospital Co. v. Swarts* (1902) 64 Kan. 367.

mother to a second husband, followed by recognition by such second husband as by such recognition it becomes presumptively the legitimate child of the second husband. This difficulty seems to arise from the excessive weight given in *Breidenstein v. Bertram*⁴⁶ and *Drake v. Milton Hospital Association*⁴⁷ to the mere fact of recognition. If recognition should be regarded merely as evidence of paternity and not as creating a presumption of paternity, the difficulty would perhaps be obviated. It may be said to this that there is no reason why the child should cease to be the legitimate child of its mother's first husband when it is recognized by the mother's second husband, but it does not seem desirable that there should exist a rule of law permitting it to be found that a child may be the natural born legitimate child of two fathers.

A child legitimated by subsequent marriage and recognition becomes legitimate for all purposes.⁴⁸ But at what time does its legitimacy begin? Does legitimacy under such circumstances relate back to the time of birth, or does it become effective only from the time of recognition? These questions cannot be answered with exactness as they seem not to have been considered in Missouri and no decisions have been found in other states. In Scotland where subsequent marriage legitimates even without recognition, legitimation operates only from the marriage; it does not relate back.⁴⁹ Probably American courts will take the same view of the matter and hold that legitimation is effective only from the time of recognition, if recognition is necessary, or from marriage if recognition is not necessary.

Another question suggests itself in this connection: does recognition of a child dead at the time of recognition make the issue of such child legitimate descendants of the natural grandfather? It seems reasonably clear that the statute requires that recognition must be during the child's lifetime and that there can be no legitimation of the descendants of a bastard by the

46. (1906) 198 Mo. 328.

47. (1915) 178 S. W. 462.

48. *Gates v. Seibert* (1900) 157 Mo. 254.

49. *Shedden v. Patrick* (1854) 1 Macq. 535, 623. See 2 Halsbury, Laws of England, 437, note g.

marriage of its parents and the recognition of such descendants as the children of the illegitimate child of their natural father.

By what law is legitimation determined? If the acts done by the father are sufficient to legitimate by the law of his domicile at the time, it is immaterial that by the law of the child's domicile at that time the child could not have been legitimated by any act done by the father.⁵⁰ But it has been held in England that by the law of the domicile of the father at the time of the child's birth there must have existed a capacity for legitimation. Hence, legitimation was held to take place only when both by the law of the father's domicile at the time of the birth of the child and by the law of the father's domicile at the time of the acts alleged to constitute legitimation the possibility of legitimation is recognized. In addition, the acts of legitimation must be those established by the law of the father's domicile at the time he acts. It is doubtful whether American courts will go to the full length of *Re Grove*.⁵¹ It is not unlikely that they will hold that all that is necessary is that legitimation be possible by the law of the father's domicile at the time he does the act alleged to result in legitimation and hence that legitimation takes place when the acts prescribed by such law are done.⁵²

3. *Children of a void marriage.* Besides those born legitimate and those made legitimate by the subsequent marriage of their parents and recognition by the father, there is another class of legitimate children under the law of Missouri, those born of a marriage which is regarded by the law as null and void. The children of such marriages are illegitimate at common law.⁵³ The statute accomplishing this result provides that "the issue of all marriages decreed null in law, or dissolved by divorce shall be legitimate."⁵⁴ This statute was first enacted in 1822,⁵⁵ but the original statute differs somewhat in phraseology from the present one. Where the present statute has the word

50. *Blythe v. Ayres* (1892) 96 Cal. 532.

51. (1888) 40 Ch. D. 216.

52. See, *Eddie v. Eddie* (N. D., 1899) 79 N. W. 856.

53. Tiffany, *Law of Persons*, p. 215.

54. Revised Statutes 1909, § 342.

55. Territorial Laws, p. 858.

"decreed" the original statute had "deemed." "Deemed" was used until the revision of 1865⁵⁶ when "decreed" was substituted.⁵⁷ Suggestions that the change in phraseology had worked a change in the law were made in *Pratt v. Pratt*,⁵⁸ but it seems now settled that "deemed" and "decreed" are not materially different in meaning;⁵⁹ so that if the evidence shows such a state of facts as would justify a decree declaring the marriage null and void, it is immaterial that there has been no such decree, and the children of such a marriage are legitimate notwithstanding.

Who are included within the term "issue"? Children born after a void marriage entered into before the enactment of the statute are included.⁶⁰ But are children who were born before the marriage of their parents to be regarded as the issue of such marriage and hence legitimate should the marriage be null and void? It would seem that the statute⁶¹ provides that only those children born after the marriage are legitimate notwithstanding the nullity of such marriage. Children born before the marriage can hardly be called issue of the marriage.⁶² Such children are probably not legitimated by subsequent marriage and recognition unless the subsequent marriage is valid,⁶³ and hence it follows that while children born after a void marriage of their parents are legitimate those born before such marriage, even tho their father recognizes them, are not legitimated.

Children are not legitimate under the statute unless there has been a marriage between their parents. This marriage need not be a ceremonial one. A void common law marriage will be as effective as a void ceremonial one in making the issue of the marriage legitimate.⁶⁴ Nor does it seem to be at all necessary

56. Revised Statutes 1825, p. 828, § 8; Revised Statutes 1835, p. 223, § 10; Revised Statutes 1845, p. 422, § 10; Revised Statutes 1855, p. 661, § 10.

57. General Statutes 1865, p. 519, § 11.

58. (1878) 5 Mo. App. 539.

59. *Green v. Green* (1894) 126 Mo. 17; *Nelson v. Jones* (1912) 245 Mo. 579.

60. *Linccum v. Linccum* (1834) 3 Mo. 441.

61. Revised Statutes 1909, § 342.

62. *Greenhow v. James* (1885) 80 Va. 636, 638.

63. See p. 10.

64. *Nelson v. Jones* (1912) 245 Mo. 579.

that the marriage be one which would have been valid if celebration or cohabitation had taken place in Missouri. The offspring of a white man and an Indian woman married according to Indian customs are legitimate, altho a marriage which is to last only so long as the husband wills, which is the case with Indian marriages, would not be valid if such a marriage was contracted between white persons in Missouri.⁶⁵ Children of a white man and of his two polygamous Indian wives are notwithstanding legitimate.⁶⁶ In the cases of Indian marriages just referred to, the legitimacy of the children does not depend entirely and probably not at all upon the statute, but upon the broad principle that the children of a marriage valid according to the law of the place where it is celebrated are legitimate everywhere unless some overriding public policy of the forum interferes.⁶⁷

At common law marriages which are not valid are either void or voidable.⁶⁸ A void marriage is one which is absolutely null from the beginning without any decree of nullity. The children of such a marriage are illegitimate and cohabitation between the parents is unlawful. A voidable marriage is one which is valid until declared a nullity by some competent court. When once set aside, it is treated as void *ab initio* and the children are illegitimate. But if not set aside during the lifetime of the parties, the children remain legitimate. In view of this hardship upon the offspring the tendency today is to regard invalid marriages as voidable rather than void and perhaps even to go further and to regard many marriages which would have been voidable at common law as valid. An impediment which would have made the marriage voidable or void at common law is

65. *Johnson v. Johnson's Administrator* (1860) 30 Mo. 72; *Boyer v. Dively* (1875) 58 Mo. 510; *La Rivière v. LaRivière* (1883) 77 Mo. 512. But if the cohabitation upon which a marriage according to Indian customs is based, takes place entirely outside of the tribe and within Missouri, inasmuch as the husband may divorce the wife at his will, it will not be regarded as a marriage at all and hence the children are illegitimate. *Banks v. Galbreath* (1899) 149 Mo. 529. *Contra* as to the invalidity of an Indian marriage outside of tribal limits, *La Rivière v. La Rivière* (1888) 97 Mo. 80.

66. *Buchanan v. Harvey* (1864) 35 Mo. 276.

67. Minor, Conflict of Laws, §§ 77, 78, 98.

68. Schouler, Husband and Wife, p. 21, § 13; Bishop, Marriage, Divorce and Separation, §§ 258, 259.

sometimes regarded as a mere ground for divorce. At common law a marriage was void if either party was incapable of intelligently consenting, either by reason of insanity or intoxication or by reason of non-age. Where one marries again who has at the time of the second marriage a husband or wife living, the first marriage being valid and not dissolved by divorce, the second marriage is void and not merely voidable. Where there exists a relationship between the parties within the prohibited degrees of the Levitical law, such a marriage was voidable merely and not void at common law. The same was true when either party was physically incapable.⁶⁹ Difference of race did not at common law prevent a marriage from being valid. However, marriages between slaves are void.⁷⁰

In Missouri marriages between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the half as well as of the whole blood and between uncles and nieces, aunts and nephews, first cousins, white persons and negroes, and white persons and Mongolians are prohibited and declared absolutely void.⁷¹ This prohibition applies to illegitimate as well as to legitimate children and relatives. It is also a crime for negroes and whites to marry.⁷² Also marriages where either of the parties has a former wife or husband living are void unless the former marriage has been dissolved.⁷³ Such marriages, also, except under certain conditions may be made the basis of a criminal charge.⁷⁴ Bigamy was made a crime early in the history of Missouri.⁷⁵ Incest was made a crime somewhat later⁷⁶ and in 1845 incestuous marriages were declared void,⁷⁷ and marriages of white persons and negroes or mulattoes illegal and void.⁷⁸ In 1855 the marriage of

69. Tiffany, *Persons*, pp. 15, 18-26; Bishop, *Marriage, Divorce and Separation*, § 285.

70. *Johnson v. Johnson* (1870) 45 Mo. 595.

71. Revised Statutes 1909, § 8280.

72. Revised Statutes 1909, § 4727.

73. Revised Statutes 1909, § 8281.

74. Revised Statutes 1909, § 4720.

75. Revised Statutes 1825, p. 305, § 75.

76. Revised Statutes 1835, p. 206, § 6.

77. Revised Statutes 1845, p. 729, § 2.

78. Revised Statutes 1845, p. 729, § 3.

a white person with a negro or a mulatto was made a misdemeanor,⁷⁹ and it was declared that such a marriage when one of the parties had a husband or wife living should not be deemed valid.⁸⁰

In 1865 it was enacted that incestuous marriages and marriages between white persons and negroes are absolutely void, while bigamous marriages are declared void.⁸¹ This distinction in phraseology has persisted but it is doubtful whether there is any real difference in meaning between "absolutely void" and "void." A marriage "absolutely void" is void but no more so than one which is simply "void."⁸² However, when other distinctions between the two sorts of marriages are considered this difference in phraseology may be entitled to some weight.

In Virginia under a statute providing that the issue of a marriage declared null in law shall nevertheless be legitimate, it was held that the issue of a marriage, void because one of the parties was already married, were legitimate, but the court intimated that the issue of a marriage of a white person and a negro would not be legitimate.⁸³ It has been held in Missouri from an early day that the issue of a marriage one of the parties to which has a husband or wife living, are legitimate⁸⁴ and this is true whether the second marriage is ceremonial or by the common law.⁸⁵ Such a marriage is void and the conclusion that the issue are legitimate seems unquestionably sound. But the legitimacy of children born of a union between a white person and a negro cannot be so easily disposed of, even assuming the existence of a ceremonial marriage between them or of cir-

79. Revised Statutes 1855, p. 1062, §§ 3, 4.

80. Revised Statutes 1855, p. 1062, § 5.

81. General Statutes 1865, p. 458, §§ 2, 3.

82. No difference in meaning is suggested in *Keen v. Keen* (1904) 184 Mo. 358, where such a difference would have been important.

83. *Stones v. Keeling* (Va., 1804) 5 Call 143, 148. "The law concerning marriages is to be construed and understood in relation to those persons only to whom the law relates; and not to a class of persons clearly not within the idea of the legislature when contemplating the subjects of marriage and legitimacy." Cf. *Greenhow v. James* (1885) 80 Va. 636, dissenting opinion of RICHARDSON, J., p. 647.

84. *Linecum v. Linecum* (1834) 3 Mo. 441; *Dyer v. Brannock* (1877) 66 Mo. 391; *Pratt v. Pratt* (1876) 5 Mo. App. 539; *Green v. Green* (1894) 122 Mo. 17.

85. *Nelson v. Jones* (1912) 245 Mo. 579.

cumstances which in the case of cohabitation between persons both white or both black would show the existence of a common law marriage. If there is neither the semblance of a ceremonial or of a common law marriage, if the intercourse is merely casual or meretricious, the issue are of course illegitimate. It is only where there is a marriage that the issue are legitimate. Even if there is such a marriage it is and has been since 1865 "absolutely void" while a bigamous marriage between persons of the same race is simply "void." Also an existing marriage is a ground for divorce, and divorce does not affect the legitimacy of the children of such marriage, but disparity of race has never been a ground for divorce.⁸⁶ Wholly aside from any considerations of public policy not reduced to statutory form, due to a repugnance to the union of blacks and whites in marriages, these differences tho some of them may be slight in themselves seem to point to the existence of a legislative policy which would justify the courts in holding, and perhaps even require them to hold, that while the issue of a bigamous marriage between persons of the same race are legitimate the issue of a marriage between blacks and whites are not. A white man and a white woman may marry lawfully unless one or the other has a spouse living from whom there has been no divorce, but blacks and whites cannot marry under any circumstances and it does not seem that the statute, when all of the legislation upon the subject is taken into consideration, should be held to make the issue of such marriages legitimate. Of the justice of a legislative policy which so punishes the innocent offspring even of an abhorrent connection, nothing is said. All of this applies as well to the offspring of incestuous marriages and of marriages between white persons and Mongolians as it does to the offspring of marriages between blacks and whites.

In *Keen v. Keen*,⁸⁷ the Supreme Court of Missouri considered for the first time the status of children born of a

86. Revised Statutes Missouri 1909, § 2370. This has been the law since 1807. See Territorial Laws, p. 90. Does this require that "void" in Revised Statutes 1909, § 8281 is to be construed as "voidable," i. e., valid until set aside? See *Eubanks v. Banks* (1866) 34 Ga. 407.

87. (1904) 184 Mo. 358.

union between a white man and a negro woman. The man purchased the woman as a slave and cohabited with her until 1883. Eight children were born, some before and some after the general emancipation of 1865. Inasmuch as the woman was a slave when the cohabitation began, there could not possibly have been, owing to her lack of capacity which would have prevented her from marrying even a negro⁸⁸ independently of the statute prohibiting it, any lawful marriage either common law or ceremonial. Their cohabitation continued, however, long after the general emancipation of slaves in 1865. But even then tho the woman could have married a negro she could not lawfully have married a white man. A connection between a white man and a white woman which originally was meretricious because of some impediment to a lawful union may presumptively become lawful if cohabitation continues after the impediment is removed.⁸⁹ The circumstances in *Keen v. Keen* indicate that this would have happened had the parties both been white. The Supreme Court held, however, that inasmuch as there never could have been a lawful marriage between the parties, the children, even those born after the general emancipation of slaves, were not legitimate. It may be answered to this that the children of a bigamous marriage are legitimate, notwithstanding that their parents are incapable of marrying, and the only reply seems to be that the statutes to which reference has been made seem to require, or at least to permit, a distinction between the two kinds of cases.⁹⁰

4. *Children of Slave Marriages.* A marriage between slaves is void because of absence of capacity,⁹¹ and the children of

88. *Johnson v. Johnson* (1870) 45 Mo. 595.

89. *Adger v. Ackerman* (1902) 115 Fed. 124, 129. See 1 Bishop. *Marriage, Divorce, and Separation*, c. XXXII, p. 419.

90. *Cf. Keen v. Keen* (1906) 201 U. S. 319. This is the same case as *Keen v. Keen* (1904) 184 Mo. 358. In the Supreme Court of the United States, the contention was made that the Missouri courts had found the existence of facts sufficient to require them to hold that there was a common law marriage between the white man and the negro woman, and as this was void, the children were under what is now Revised Statutes 1909, § 342 legitimate and entitled to inherit from their father; and that the refusal so to hold, had deprived the children of their property without due process of law. The Supreme Court of the United States held that no federal question was involved and dismissed the writ of error.

91. *Johnson v. Johnson* (1870) 45 Mo. 595.

such marriage are accordingly not legitimate.⁹² However, if the parties to the marriage were emancipated and cohabited after the emancipation and continued to acknowledge each other as husband and wife the marriage became binding,⁹³ but perhaps only from the time of emancipation. Children subsequently born are, of course, legitimate. Whether children born before emancipation are legitimated by the marriage after emancipation and recognition by the father, is not clear. But this is settled by a statute⁹⁴ which declares that the children of slave parents who were living together in good faith as man and wife at the time of the birth of such children, are to be taken as legitimate children of such parents and that all children of one slave mother are to be deemed lawful brothers and sisters. The slave parents must, however, have gone thru the form of marriage or have lived together as man and wife. Children born of a casual intercourse are not legitimate under this statute; but where the connection is something more than that, even tho the master separates the slave parents and directs their marriage or cohabitation with others, children of all such connections are legitimate.⁹⁵

II ILLEGITIMACY

By the common law a bastard was said to be *filius nullius*. He was no more the legitimate child of his mother than of his father. He could not inherit from either, nor from the legitimate children of his parents. He might transmit an inheritance but he could not receive one. He was not a member of the family of either his father or his mother, but he might establish a new family for himself and his children born in lawful wedlock were legitimate and his only heirs.⁹⁶

This state of the law has been changed by statute in many states. In Missouri, the statute provides that bastards are capable of inheriting and transmitting inheritance on the part of the

92. But see *Lee v. Lee* (1901) 161 Mo. 52, 56, 57.

93. *Johnson v. Johnson* (1870) 45 Mo. 595.

94. Revised Statutes 1909, § 344. This was first enacted in 1865. Laws of 1865, p. 22, § 2.

95. *Lee v. Lee* (1901) 161 Mo. 52.

96. 2 Kent, Commentaries (11th ed.) 212.

mother and that the mother may inherit from her bastard child or children in like manner as if they had been lawfully begotten of her.⁹⁷ In *Bent's Administrator v. St. Vrain*,⁹⁸ it was held that the real estate of an illegitimate son did not, upon his death, pass to his mother or to his illegitimate brother. This is not now the law as to the mother and she may now inherit from her illegitimate child.⁹⁹ In *Moore v. Moore*,¹⁰⁰ it was held that under the present statute an illegitimate child could inherit real estate from a brother of his deceased mother and the court vigorously criticised *Bent's Administrator v. St. Vrain*, and intimated that, in its opinion, that case should have been decided differently even tho the amendment of 1865 had not then been made. In *Marshall v. Wabash Railway Co.*,¹⁰¹ it was held that the mother of an illegitimate child may sue for damages for the wrongful death of such child under a statute which, in case the person killed was a minor and unmarried, permitted suit by the father and mother, and if either of them be dead, by the survivor. The court said that the statute "does not, it is true, legitimate a bastard, but it concedes to him inheritable blood on the mother's side." Once admitting, as was done in *Moore v. Moore*, that an illegitimate child may inherit from its mother's relatives, it is difficult to see just wherein the position of a bastard, so far as its mother is concerned, differs from that of her legitimate children. In *Bent's Administrator v. St. Vrain*, it was held that the estate of one illegitimate child could not be inherited by another illegitimate child of the same mother. But perhaps, in view of *Moore v. Moore*, it can be said that this case no longer states the law. If a bastard may inherit from his mother's brother from whom the mother herself might have inherited, it would seem to follow that he may also inherit from his mother's child from whom she might have inherited, whether the child be legitimate or illegitimate, if the conditions established

97. Revised Statutes 1909, § 340. This statute, with the omission of "and such mother may inherit from her bastard child or children", was passed in 1822. Territorial Laws, p. 857, § 7, Revision of 1825, p. 328, § 7. The words quoted were added in 1865. General Statutes 1865, p. 518, § 9.

98. (1860) 30 Mo. 268.

99. General Statutes 1865, p. 518, § 9, Revised Statutes 1909, § 340.

100. (1902) 169 Mo. 432.

101. (1894) 120 Mo. 275.

by the statutes as to descents and distributions¹⁰² have been satisfied. If this be true, what differences are there between the positions of legitimate and illegitimate children, so far as the mother is concerned? So far as inheritance is concerned, there seems to be none. As the mother is the natural guardian of her illegitimate children whether the father is dead or alive,¹⁰³ and as she is entitled to the custody and services of her illegitimate children during minority¹⁰⁴ and perhaps is bound to support them,¹⁰⁵ it is not going too far to say that the law has placed illegitimate children in the same position so far as their mother is concerned as that of her legitimate children whose father is dead.

III ADOPTION

The status of adoption was unknown to the common law.¹⁰⁶ It is even now unknown to the law of England,¹⁰⁷ Scotland and Holland, and of other European countries as well. It is not recognized in Canada, except in New Brunswick.¹⁰⁸ It seems strange that this should be the case, as adoption seems to have been an institution of great importance and significance in the primitive law of all Aryan peoples. It existed among the Greeks and Romans,¹⁰⁹ among the Germanic tribes,¹¹⁰ and it exists and

102. Revised Statutes 1909, § 332 *et seq.*

103. Revised Statutes 1909, § 403.

104. Tiffany, Persons, 225; *Illinois Central R. R. Co. v. Sanders* (Miss., 1913) 61 So. 309.

105. See the *dictum* in *Marshall v. Wabash Railway Co.* (1894) 120 Mo. 275, 282.

106. *Sarazin v. Union Pacific Ry. Co.* (1900) 153 Mo. 479; *Lynn v. Hockaday* (1901) 162 Mo. 111; *Hockaday v. Lynn* (1906) 200 Mo. 456; *Ross v. Ross* (1880) 129 Mass. 243, 262; Tiffany, Persons, p. 221. The suggestion to the contrary in *Lindsley v. Patterson* (1915) 177 S. W. 826, is probably due to a failure to distinguish between adoption as a status and a contract to adopt, altho even a contract to adopt, insofar as it purports to involve a transfer of parental rights and duties is probably void at common law. *Humphreys v. Polak* (1901) 2 K. B. 385.

107. 17 Halsbury, Laws of England, 111; Dicey, Conflict of Laws (2d ed.) p. 461, note 2.

108. 2 Burge, Colonial and Foreign Laws (new ed.) pp. 405, 506.

109. 1 Encyclopedia Britannica (11th ed.) 213.

110. Brissaud, History of French Private Law (Howell's translation) p. 217.

has existed from the earliest times among the Hindus.¹¹¹ Perhaps its origin was due primarily to religious considerations based on ancestor worship, the adopted son being regarded just as tho he were a natural son of the adopting parent and hence just as capable of carrying on the worship of the family ancestors.¹¹² It also served as a method of providing for a disposition of property after death, at a time when no power or only a limited power of testation existed.¹¹³

1. *Creation of the Status.* In the United States, adoption was made possible at an early day in Louisiana and Texas,¹¹⁴ and it has now become a part of the law of most if not all of the states.¹¹⁵ The Missouri statute was enacted in 1857¹¹⁶ and provided that "if any person in this state shall desire to adopt any child or children as his or her heir and¹¹⁷ devisee,¹¹⁸ it shall be lawful for such person to do the same by deed, which deed shall be executed, acknowledged¹¹⁹ and recorded in the county of the residence of the person executing the same, as in the case of conveyance of real estate."¹²⁰ These statutes, being

111. Maine, *Early Law and Custom*, 96.

112. Brissaud, *History of French Private Law*, p. 217.

113. Maine, *Ancient Law* (original ed.) 188; Sohm, *Institutes of Roman Law* (2d ed., Ledlie's translation) p. 529. On the history of adoption, see *Hockaday v. Lynn* (1906) 200 Mo. 456.

114. *Ross v. Ross* (1880) 129 Mass. 243, 262.

115. 1 Stimson, *American Statute Law*, §§ 6640-6651. For the distinction between adoption under the Roman Law and under modern American statutes, see *Reinders v. Koppelman* (1876) 68 Mo. 462; *Woodward's Appeal* (1908) 81 Conn. 152. Adoption under these statutes has many resemblances to Justinian's "*adoptio minus plena*." See Sohm, *Institutes of Roman Law* (2d ed.) p. 501. The conditions under which the status of adoption may be created under the modern civil codes of Europe are much more restricted than under the American statutes. 2 Burge, *Colonial and Foreign Laws*, p. 391.

116. Laws of 1857, p. 59, General Statutes 1865, p. 478, §§ 1, 2, 3.

117. "And" was changed to "or" in Revised Statutes 1889, § 968.

118. The words "or devisee" were omitted in the statute enacted in 1909. Laws 1909, p. 130.

119. Amended in 1909, so as to read "and acknowledged by the person adopting such child or children and recorded", etc. Laws of 1909, p. 134, Revised Statutes 1909, § 1671. The amendments of 1909 are perhaps a tardy recognition of the validity of the criticisms as to the form of the act of 1857, made in *Matter of Clements* (1883) 78 Mo. 352 and in *Moran v. Stewart* (1894) 122 Mo. 295.

120. Prior to the adoption of the Constitution of 1875, which prohibited the passage of special acts of adoption, Art. 4, § 53 (9),

in derogation of the common law, are to be strictly construed,¹²¹ but in the application of this principle the authorities are not uniform. It has been said that substantial compliance with the statute or compliance as to essentials is all that is necessary.¹²² Perhaps this is all that was meant by the statement in *Hockaday v. Lynn*¹²³ that "strict construction . . . is not extended to the act of adoption itself" which is to be "liberally construed in favor of the child." However, it has been held that the provisions of the statute are mandatory and cannot be departed from.¹²⁴

In Missouri, the deed of adoption must be executed, acknowledged and recorded as in the case of conveyances of real estate.¹²⁵ The status of adoption cannot be created by an unacknowledged deed¹²⁶ but such instrument may be a valid contract to adopt.¹²⁷ A deed of adoption is valid even tho the parents of the child have not consented or joined in the deed;¹²⁸ nor is it necessary that the wife of the adopting father should join in the execution of the deed or consent to the adoption.¹²⁹ If she does not join, the deed is void as to her but valid as to her husband.¹³⁰ Nor does it seem necessary that the consent of the child should be given or that the deed should be approved by a court except in two instances. Where the child is an orphan and without a

adoption was occasionally accomplished by special act of the legislature. See *Davis v. Hendricks* (1889) 99 Mo. 478.

121. *Sarazin v. Union Pacific Ry. Co.* (1900) 153 Mo. 479; *Lynn v. Hockaday* (1901) 162 Mo. 111; *Hockaday v. Lynn* (1906) 200 Mo. 456; *Bresser v. Saarman* (1901) 112 Ia. 720; *Long v. Dufur* (Ore., 1911) 113 Pac. 59.

122. *Ferguson v. Herr* (1902) 64 Neb. 649, 659; *Purinton v. Jamrock* (1907) 195 Mass. 187.

123. (1906) 200 Mo. 456, 464.

124. *Burnes v. Burnes* (1904) 132 Fed. 485. See also, *In Re Carroll's Estate* (Pa., 1908) 68 Atl. 1038.

125. Revised Statutes 1909, § 1671. As to the execution and recording of conveyances of real estate, see Revised Statutes 1909, §§ 2792, 2794, 2796-99, 2809.

126. *Sarazin v. Union Pacific Ry. Co.* (1900) 153 Mo. 479; *Lamb v. Morrow* (1908) 140 Ia. 89.

127. *Healey v. Simpson* (1892) 113 Mo. 340.

128. *Matter of Clements* (1883) 78 Mo. 352; *Clarkson v. Hatton* (1898) 143 Mo. 47.

129. *Haworth v. Haworth* (1907) 123 Mo. App. 303.

130. *Burnes v. Burnes* (1904) 132 Fed. 485.

guardian¹³¹ and has not been legally entrusted to any incorporated institution, an application must be made to the probate court of the county, probably the county where the child lives, tho this is by no means clear. If the court is satisfied that it is to the best interest of the child that the application for adoption be granted, an order to that effect will be entered of record. The person desiring to adopt the child then executes a deed and the adoption is completed.¹³² Should the child, however, be under seven and have been placed, either by its parents or otherwise, in the care of an incorporated institution in Missouri for the care and custody of children or of any individual who may conduct such an institution, and have been abandoned by its parents for two years, either before or after its entry into the institution, the principal officer of the institution may, with the approval of the probate court of the county or city in which the institution is, execute a deed of adoption to any proper person or persons who must join in the deed.¹³³

The original name of the adopted child does not have to appear in the deed of adoption if its identity is otherwise indicated with sufficient certainty.¹³⁴ The probate court of the proper county may order in its discretion a change in the name of any adopted child.¹³⁵

There seems to be no limitation upon the age of the person adopted. A person over twenty-one may be adopted¹³⁶ as well as a person under that age. There is no objection to the adoption of a child by an unmarried man.¹³⁷ Perhaps the adopting parent must have capacity enough to convey real estate in order to execute a deed of adoption, as the statute requires that the deed must be executed, acknowledged and recorded as in the case of a conveyance of real estate. Hence, the adopting parent

131. As to guardians of children, see Revised Statutes 1909, § 403.

132. Revised Statutes 1909, § 1678.

133. Revised Statutes 1909, § 1675. This first appears in Revised Statutes 1899, § 5250.

134. *Fosburgh v. Rogers* (1893) 114 Mo. 122.

135. Revised Statutes 1909, § 1674.

136. *In re Moran* (1899) 151 Mo. 555.

137. *Higberg v. St. Louis & San Francisco R. R. Co.* (1912) 164 Mo. App. 514, 564.

if a man must be twenty-one years old, and if a woman, eighteen.¹³⁸ A married woman may adopt by joining in a deed of adoption with her husband.¹³⁹ It is not clear whether the statute requires that the husband must also adopt at the same time or whether he joins merely for the purpose of showing his consent to the adoption by his wife. Nor does it seem clear whether the statute deprives a married woman, in view of the removal of the restrictions upon her capacity to contract and to convey her real estate,¹⁴⁰ of what would otherwise seem to be her right to adopt by her own deed as fully as tho she were unmarried. A child may be adopted by more than one person and thereby becomes the adopted child of all its adopting parents, even tho they may not be husband and wife.¹⁴¹

Can the status of adoption be created in any other way than by a deed? The question as to the necessity for a deed was raised in *Martin v. Martin*¹⁴² where it was held to be unnecessary to decide it, but in *Lindsley v. Patterson*¹⁴³ it was said, tho it was not necessary to the decision, that the status of mother and child was created by words, letters and conduct, in the absence of a deed of adoption, thus intimating that there is a common law method of adoption distinct and apart from the statutory one. Adoption is a status and not a contract¹⁴⁴ just as marriage is a status and not a contract,¹⁴⁵ altho a contract may have preceded it. As the status created by adoption is like that of parent and natural child or at least like that of ancestor and heir,¹⁴⁶ the respective rights and obligations of adopted child and adopting parent may be affected and changed by contract just as in the case of parent and natural child, or ancestor and heir, and it is probably immaterial whether the contract is made before or after the creation of the status, differing in this respect from the contracts affecting the status of husband and

138. Revised Statutes 1909, § 402.

139. Revised Statutes 1909, § 1672.

140. Revised Statutes 1909, § 8304.

141. *Burnes v. Burnes* (1904) 132 Fed. 485.

142. (1913) 250 Mo. 539, 550.

143. (1915) 177 S. W. 826, 832.

144. *Re Ziegler* (1913) 143 N. Y. S. 562.

145. Tiffany, Persons, p. 4. But see Revised Statutes 1909, § 8279.

146. Tiffany, Persons, pp. 222-3. See also, *infra*, p. —.

wife. Even if the contract is contained in the deed of adoption and is void for want of consideration, this does not affect the validity of the adoption, and the status is created notwithstanding.¹⁴⁷ It would seem, therefore, that as adoption was not possible by the common law and came into the law only by means of a statute, that the statutory method of adoption is exclusive. In no other way has the law provided for the creation of the status. It is believed that there is no decision in Missouri to the contrary, notwithstanding the fact that in *Lynn v. Hockaday*¹⁴⁸ a decree was entered declaring the plaintiff who claimed to have been adopted by oral agreement the duly adopted child of the one who had agreed to adopt her. It is necessary, therefore, that the decisions should be carefully examined.

A promise to make a will in favor of a particular person either leaving him all or a specific thing or an undivided share of the estate of the promissor is valid, if supported by a consideration, and will be specifically enforced against heirs, devisees, or purchasers with notice.¹⁴⁹ Such an agreement does not seem to be within the statute of frauds,¹⁵⁰ and even if it were¹⁵¹ a court of equity would find no difficulty in decreeing specific performance if there were part performance sufficient to take it out of the statute.¹⁵² If the consideration for the agreement is to take care of the promissor during his life,¹⁵³ or to live with him as a dutiful child or as his own child,¹⁵⁴ full performance on the part of the promisee is regarded as sufficient to enable him to enforce the agreement, even tho it is oral.

147. *Fugate v. Allen* (1906) 119 Mo. App. 183.

148. (1901) 162 Mo. 111, 127.

149. *Wright v. Turley* (1860) 30 Mo. 389; *Gupton v. Gupton* (1870) 47 Mo. 37; *Van Dyne v. Vreeland* (1857) 11 N. J. Eq. 370, (1858) 12 N. J. Eq. 142; Fry, *Specific Performance* (5th ed.) p. 114.

150. Revised Statutes 1909, § 2783. See also *Lynn v. Hockaday* (1901) 162 Mo. 111, 125.

151. In *Sitton v. Shipp* (1877) 65 Mo. 297, an oral agreement to convey land by deed in consideration that plaintiffs would take care of promissor during her life, was enforced.

152. *Nowack v. Berger* (1896) 133 Mo. 24; *Martin v. Martin* (1913) 250 Mo. 539.

153. *Gupton v. Gupton* (1870) 47 Mo. 37; *Teats v. Flanders* (1893) 118 Mo. 660; *Alexander v. Alexander* (1899) 150 Mo. 579.

154. *Sutton v. Haydon* (1876) 62 Mo. 101; *Sharkey v. McDermott* (1887) 91 Mo. 647; *Lynn v. Hockaday* (1901) 162 Mo. 111; *McElwain v. McElwain* (1902) 171 Mo. 244.

It is a short step from a promise to devise or bequeath property to a promise to adopt and a still shorter step if the promise is both to adopt and devise or bequeath property. It would seem that the first case in Missouri in which there was both an agreement to adopt and an agreement to devise or bequeath property is *Sutton v. Haydon*.¹⁵⁵ The promissor, whose interest in the property remaining at her decease was equitable, failed to leave anything to the plaintiff. It was held that plaintiff was entitled to a decree of specific performance against the promissor's heirs. No stress was laid upon the agreement to adopt and it does not clearly appear that the plaintiff had not been adopted.

In *Sharkey v. McDermott*,¹⁵⁶ there was a similar agreement to adopt and leave property, but no deed of adoption had been executed. The petition prayed to have the plaintiff's right to adoption established and that the plaintiff be declared the heir of the promissor. Upon demurrer it was held that the petition stated a cause of action,¹⁵⁷ and that the plaintiff's right sprang from an agreement which was not merely and solely one to adopt but was in part one to leave property at the death of the promissor. The fact that no adoption had taken place did not deprive the plaintiff of her right to the property she had been promised.

In *Healey v. Simpson*,¹⁵⁸ a similar case, it was said that altho the written contract, specific performance of which was asked, did not operate as an adoption, "it can operate as a contract for adoption, which may, upon a proper showing, be specifically enforced in equity". The court cited *Wright v. Turley*,¹⁵⁹ *Gupton v. Gupton*,¹⁶⁰ and *Sutton v. Haydon*,¹⁶¹ the first two of which cases do not involve any question of adoption, and in the last altho there was an agreement to adopt as well as to leave property, property rights alone were involved. Thus, it would

155. (1876) 62 Mo. 101.

156. (1887) 91 Mo. 647.

157. The St. Louis Court of Appeals had held the contrary in *Sharkey v. McDermott* (1884) 16 Mo. App. 80.

158. (1892) 113 Mo. 340, 346.

159. (1860) 30 Mo. 389.

160. (1870) 47 Mo. 37.

161. (1876) 62 Mo. 101.

seem that the language previously quoted from *Healey v. Simpson*¹⁶² is not to be taken to refer to the creation of the status by a mere contract to adopt, but to the specific performance of an agreement to leave property by will. This is also true of *Steele v. Steele*¹⁶³ in which the agreement was to adopt and to leave property.¹⁶⁴ Even should adoption be impossible, because of the absence of a statute authorizing it, the contract to leave property will be enforced altho there may also have been an agreement to adopt.¹⁶⁵

It may not always be easy to determine whether there is a contract to leave property by will.¹⁶⁶ In *Davis v. Hendricks*,¹⁶⁷ the child was adopted by means of a special act of the legislature, obtained in fulfilment of an agreement between the child's natural father and the adopting father to the effect that the latter would adopt the child and make her his heir. It was held that there was nothing in the agreement which prevented the adopting parent from disposing of his whole estate by a will which gave nothing to the child. The agreement involved nothing more than would be involved in a completed adoption and an adopted child has no greater right to insist upon sharing in the property of its adopting parent in case it is disposed of by will than has a natural child. It is difficult to see why there should be a different result if there has been no adoption, but merely an agreement to make the child an heir. An agreement to make one an heir is perhaps nothing more than an agreement to adopt¹⁶⁸ and the same is probably true of an agreement to take the child as a lawful child and to give it a share with the natural children of the promissor in the distribution of his estate.¹⁶⁹

162. (1892) 113 Mo. 340.

163. (1901) 161 Mo. 566.

164. See also, *Van Dyne v. Freeland* (1857) 11 N. J. Eq. 370 (1858) 12 N. J. Eq. 142; *Starnes v. Hatcher* (Tenn., 1908) 117 S. W. 219; *Peterson v. Bauer* (1909) 83 Neb. 405.

165. *Godine v. Kidd* (1892) 19 N. Y. Supp. 335.

166. *Bowins v. English* (1904) 138 Mich. 178.

167. (1889) 99 Mo. 478.

168. *Pemberton v. Perrin* (1913) 94 Neb. 718.

169. *Healey v. Simpson* (1892) 113 Mo. 340; *Nowack v. Berger* (1896) 133 Mo. 24; *Westerman v. Schmidt* (1899) 80 Mo. App. 344;

What, then, is the effect of an agreement merely to adopt which does not include an agreement to leave property? There seems to be no valid reason why the child should not be given in equity the rights of an adopted child in the property of the one who promised to adopt it but who failed to execute a deed. If the promissor leaves a will then the child can get nothing in equity, unless it is to be regarded as a pretermitted child under the statute.¹⁷⁰ As an adopted child would be so regarded,¹⁷¹ it seems to follow that a child whose rights arise only from a contract to adopt should be placed in the same position.¹⁷² Hence, if there is an intestacy the child will get in equity whatever it would have been entitled to had it been adopted by deed.¹⁷³ Even in an action at law a contract to adopt may make it possible for the child to urge those defenses which a legally adopted child might urge, but only if equitable defenses are permitted in actions at law.¹⁷⁴ The rights of the child, however, arise out of the contract and do not flow from status, because no status has been created. As in all the cases cited the one who promised to adopt was dead when the suit for specific performance was instituted, the status could not possibly have been created by the decree.¹⁷⁵

But suppose a suit is brought against the promissor during his life asking that the court order him to specifically perform his agreement to adopt by executing the deed of adoption required by the statute. It is doubtful if a cause of action arises until the death of the promissor,¹⁷⁶ at which time the status cannot possibly be created, but no case in Missouri or elsewhere

Lynn v. Hockaday (1901) 162 Mo. 111; *Martin v. Martin* (1913) 250 Mo. 539.

170. Revised Statutes 1909, § 544.

171. *Fugate v. Allen* (1906) 119 Mo. App. 183; *Horton v. Troll* (1914) 183 Mo. App. 677.

172. *Thomas v. Maloney* (1910) 142 Mo. App. 193.

173. *Healey v. Simpson* (1892) 113 Mo. 340; *Lynn v. Hockaday* (1901) 162 Mo. 111; *Martin v. Martin* (1913) 250 Mo. 539; *Horton v. Troll* (1914) 183 Mo. App. 677; *Lindsley v. Patterson* (1915) 177 S. W. 826; *Roberts v. Roberts* (1915) 223 Fed. 775. See also *Van Tine v. Van Tine* (N. J. 1888) 15 Atl. 249; *Crawford v. Wilson* (1913) 139 Ga. 654; *Herrick's Estate* (1913) 124 Minn. 85.

174. *Godine v. Kidd* (1892) 19 N. Y. Supp. 335.

175. *Starnes v. Hatcher* (Tenn., 1908) 117 S. W. 219.

176. *Horton v. Troll* (1914) 183 Mo. App. 677.

has been found involving the exact point. *Beach v. Bryan*¹⁷⁷ comes very near it. There an oral agreement was made by the plaintiffs with the defendant, who was the mother of the child, by which the plaintiffs agreed to adopt it, the mother agreeing to relinquish her right to the control and custody of the child. Subsequently the mother refused to execute the deed of adoption and finally took the child away from the plaintiffs, who thereupon brought suit asking that the court decree that the child was the lawful adopted child of the plaintiffs and that the defendant be held to have relinquished all claims which she may have had to its control and custody. The court found that there was no evidence that the mother had agreed to surrender the custody of the child to the plaintiffs, but it said that courts of equity deal only with property rights and further that there were no property rights involved except in the suggestion that the plaintiffs might be entitled to the earnings of the child until he attained his majority; and as to this it was intimated that tho an agreement for personal service cannot be specifically performed possibly a recovery in damages might be had. The court said, however, that even had the contract been established, no decree for its specific performance was possible.

It would seem to follow, therefore, that in so far as a contract to adopt involves mere property rights, arising upon the death of the person who made the agreement to adopt, a contract for adoption may be specifically enforced and the child may be regarded in equity as entitled to all the property rights it would have been entitled to had it been legally adopted. But so far as the contract to adopt may involve a change of custody and control, the admission of the child to the family of the promisor and any other matters not involving questions of property, the contract cannot be specifically enforced.

It seems unquestionable that an action at law for damages will lie for the breach of the contract to adopt, and in view of the fact that specific performance of the agreement will be decreed so far as it affects property rights, it is not improbable that the measure of damages will be the value of the interest the

177. (1911) 155 Mo. App. 33.

child has lost by reason of the failure to adopt it. In Pennsylvania, however, where the only decisions upon this question have been found, the measure of damages is held to be the value of the services performed or the outlay incurred by the child on the strength of the promise.¹⁷⁸

Since the enactment in 1889 of the statute conferring upon married women a capacity to contract as *femmes sole*,¹⁷⁹ there seems to be no question that a married woman is bound by her contract to adopt. A question may be raised, however, as to whether a contract to adopt made by her in which her husband has not joined, may be enforced against her. If the statute furnishes the only method by which she may legally adopt, *i.e.*, by a deed in which her husband joins,¹⁸⁰ perhaps a contract to adopt is not binding upon her unless her husband either joins in it or in some way consents. In all of the cases found except *Lindsley v. Patterson*,¹⁸¹ the husband joined in the contract, and there he probably consented afterwards, but the decision would seem to indicate that even this is unnecessary.

But if such a contract was made before 1889 the question of its enforcement presents more difficult problems. In *Sharkey v. McDermott*¹⁸² the promise to adopt and to leave property was made by a man and his wife.¹⁸³ The man died leaving all of his property to his widow and she subsequently died intestate. Apparently the contract upon which the suit was brought was made by the wife after the death of her husband upon a new and adequate consideration.¹⁸⁴ As she was then under no disability, the contract was clearly binding upon her. But the court further held that even if this was not the case, the wife took the property subject to the rights of the plaintiff created by the contract with her husband and hence in either case the result would be the same. In *Horton v. Troll*,¹⁸⁵ there seems to have

178. *Sandham v. Grounds* (1899) 94 Fed. 83; *In re Carroll's Estate* (Penn., 1908) 68 Atl. 1038.

179. Revised Statutes 1909, § 8304.

180. Revised Statutes 1909, § 1672.

181. (Mo., 1915) 177 S. W. 826, 829.

182. (1887) 91 Mo. 647.

183. See *Sharkey v. McDermott* (1884) 16 Mo. App. 80.

184. *Sharkey v. McDermott* (1887) 91 Mo. 647, 653.

185. (1914) 183 Mo. App. 677.

been no evidence of a new contract upon a new consideration made by the married woman after she became discover, but the court held that "ratification after removal of disability of coverture is valid."¹⁸⁶ Whether or not she could so ratify would seem to depend upon the further question whether prior to 1889 the contracts of a married woman are void or voidable. If void they cannot be ratified but if merely voidable they may. However, contracts made with special reference to the separate estate of married women charge such estates in equity without reference to the question whether they are void or voidable at law.¹⁸⁷ The contracts of a married woman were regarded as void at common law.¹⁸⁸ It has recently been said that the contracts of married women made prior to 1889 were not void in Missouri but voidable,¹⁸⁹ but the Missouri cases cited in support of this statement do not seem fully to sustain it. The question as to whether an executory contract made by a married woman prior to 1889 is valid and enforceable against her is beyond the scope of this study.

In *Lindsley v. Patterson*,¹⁹⁰ the contract to adopt was made by the married woman alone and the contract was enforced against the married woman's estate upon the ground that she had ratified it by words and conduct after discoveriture resulting from divorce. There seems to have been no new promise and no new consideration. She seems, however, to have been possessed of a separate estate, and perhaps the decision holding that her estate was bound by the contract can be sustained upon the theory that the contract was intended to charge her separate estate and was made with special reference thereto, and hence created a charge which would be valid in equity.¹⁹¹

The agreement to adopt, whether with or without a promise to leave property, must be based upon a valid consideration. A mother's promise to marry the promissor is regarded as a

186. *Horton v. Troll* (1914) 183 Mo. App. 677, 690.

187. 1 Parsons, Contracts (9th ed.) * 368.

188. 1 Parsons, Contracts (9th ed.) * 345.

189. *Lindsley v. Patterson* (Mo., 1915) 177 S. W. 826, 829.

190. (Mo., 1915) 177 S. W. 826, 829.

191. *De Baun v. Wagoner* (1874) 56 Mo. 347.

valid consideration for his promise to adopt her child.¹⁹² But a promise that the child should be an equal heir with the promisor's own children given in consideration of the promise of the child's father to surrender the custody and control of the child, is unenforceable for want of consideration if the father had no right to the custody of the child by reason of a divorce decree which had given the custody to the mother.¹⁹³

A contract to make a will, or to leave property, or to adopt must be proved by evidence that is "cogent, clear and convincing",¹⁹⁴ establishing the existence of the contract beyond a reasonable doubt.¹⁹⁵ There is probably no objection to the proof of such a contract by circumstantial evidence, but the circumstances should be consistent only with the existence of an agreement to adopt or to leave property. The mere fact that an orphan child is taken into the family of a stranger is not necessarily consistent only with an agreement to adopt or to make a will in the child's favor.¹⁹⁶ Whether *Roberts v. Roberts*¹⁹⁷ and *Lindsley v. Patterson*¹⁹⁸ are entirely consistent with these principles, is not clear. It would seem that in view of the great possibility of imposition in such cases, the courts are justified in insisting upon proof of the existence of the contract beyond a reasonable doubt.

There is no method provided by the statute for setting aside an adoption once the status is created. Perhaps, if there were fraud in the procurement of the adoption or undue influence,¹⁹⁹ a court of equity would set the adoption aside and

192. *Nowack v. Berger* (1896) 133 Mo. 24; *Martin v. Martin* (1913) 250 Mo. 539.

193. *Fugate v. Allen* (1906) 119 Mo. App. 183.

194. *Teats v. Flanders* (1893) 118 Mo. 660; *McElwain v. McElwain* (1902) 171 Mo. 244; *Steele v. Steele* (1901) 161 Mo. 566.

195. *Grantham v. Gossett* (1904) 182 Mo. 651; *Wales v. Holden* (1908) 209 Mo. 552. In both of these cases and in the following it was held that the contract was not established: *Teats v. Flanders* (1893) 118 Mo. 660; *Kinney v. Murray* (1902) 170 Mo. 674; *McElwain v. McElwain* (1902) 171 Mo. 244; *McKee v. Higbee* (1904) 180 Mo. 263; *Asbury v. Hicklin* (1904) 181 Mo. 658; *Rosenwald v. Middlebrook* (1905) 188 Mo. 58; *Berg v. Moreau* (1906) 199 Mo. 416.

196. *Sitton v. Shipp* (1877) 65 Mo. 297; *Wales v. Holden* (1908) 209 Mo. 552.

197. (1915) 223 Fed. 775.

198. (Mo., 1915) 177 S. W. 828.

199. *Phillips v. Chase* (1909) 203 Mass. 556.

cancel the deed, just as it would under similar circumstances cancel and set aside a deed of real estate. There is probably no way by which the parties to the status can destroy it by agreement among themselves. A paper executed by the adopting parent agreeing to permit the mother to have the child whenever she might call for it, is not a revocation of the deed of adoption.²⁰⁰

2. *Rights of adopting parent.* The statutes provide that a child may be adopted as the heir of the adopting parent²⁰¹ and that the child shall have "the same right against the person or persons executing the deed, for support and maintenance and for proper and humane treatment as a child has, by law, against lawful partents."²⁰² Does this give an adopted child the status of a child of the adopting parent? The child by adoption certainly has something more than a mere capacity to inherit. It is entitled to maintenance and support as if it were a legitimate child. But is the adopting parent entitled to its custody? If the natural parents consent to a transfer of custody by joining in the deed of adoption, then the adopting parent is entitled to the custody of the child as against the natural parents.²⁰³ But if the natural parents do not join, the adopting parent cannot retain the custody of the child as against them.²⁰⁴ The statute provides, also, that on the same conditions the adopting parent is entitled to the services of the child.²⁰⁵

If a child under seven years of age has been abandoned and is adopted from an incorporated institution in Missouri for the care and custody of minor children, the adopting parent has the right to both the custody and services of the child.²⁰⁶ If the child has no guardian and has not been legally entrusted to any incorporated institution, and has been adopted under the direction of the probate court this adoption will have the effect of giving

200. *Matter of Clements* (1883) 78 Mo. 352.

201. Revised Statutes 1909, § 1671.

202. Revised Statutes 1909, § 1672.

203. *Matter of Clements* (1883) 78 Mo. 352. This result has been confirmed by statute. Revised Statutes 1909, § 1677.

204. *Orey v. Moller* (1909) 142 Mo. App. 579.

205. Revised Statutes 1909, § 1677.

206. Revised Statutes 1909, § 1675. As to the constitutionality of a similar statute, see *Purinton v. Jamrock* (1907) 195 Mass. 187.

the adopting parent the right to the custody and services of the child.²⁰⁷ It cannot, therefore, be said with accuracy that adoption in all cases puts the adopted child in the position of a natural child so far as the rights of the adopting parent are concerned.

If the adopted child is living with the adopting parent, the latter has the same right of reasonable correction as he would have in the case of his natural children and is subject to the same criminal liability in case of its abuse.²⁰⁸

Upon the death of a legitimate natural child, intestate and without a widow or children, its estate will pass to its parents and its brothers and sisters.²⁰⁹ Upon the death of an adopted child intestate and without a widow or children, perhaps its estate does not pass to its adopting parents nor to its brothers and sisters by adoption, but to its own natural kindred. In *Reinders v. Koppelman*,²¹⁰ a child had been adopted and had received property as a devisee under the will of its adopting father. The child then died intestate and childless. It was held that none of the property received under the will of the adopting parent passed to the child's relatives by adoption but all of it went to its blood relatives. This decision has been criticized²¹¹ upon the ground that the statutes of descent and distribution should be so construed as to prevent what may be regarded as the injustice of permitting property received from the adopting parent to pass to persons in whom the adopting parent had no interest to the exclusion of his own kindred. It has also been suggested that if the adopted child should die without blood relatives the property would escheat to the state notwithstanding that blood relatives of the adopting parent are alive. However, as there is no provision either in the statutes regulating descent and distribution or in the statutes providing for adoption directing that the adopting parent or his blood relatives may inherit under such circumstances, the court was justified in refusing to read such a provision into them. It may be suggested that there

207. Revised Statutes 1909, § 1678.

208. *State v. Koonse* (1907) 123 Mo. App. 655.

209. Revised Statutes 1909, § 332.

210. (1878) 68 Mo. 482.

211. *Hockaday v. Lynn* (1906) 200 Mo. 456; *Humphries v. Davis* (1884) 100 Ind. 274; *Tiffany, Persons*, p. 224.

should be a revision of the statutes of descent and distribution and a re-drafting of the adoption statute so as to give the adopting parent and his blood relatives rights of succession under such circumstances. In the case of the adoption of abandoned children from an institution, as the statute provides that the adopting parent shall be entitled to all the rights of lawful parents against the child to the exclusion of any rights of its natural parents,²¹² the adopting parent may be entitled to inherit from the adopted child.

3. *Rights of adopted child.*²¹³ It has been said that an adopted child may inherit from its adopting parent as tho it were a legitimate natural child.²¹⁴ Adoption of a child does not deprive the adopting parent of his power to dispose of his property by deed,²¹⁵ or will,²¹⁶ but as adopted children are children within the meaning of the statute as to pretermitted children²¹⁷ a will of the adopting parent is void as to the adopted children unless they are named therein or provided for.²¹⁸ They are entitled to inherit only from the adopting parent and therefore cannot inherit from a brother of the deceased adopting parent.²¹⁹

The question as to whether the descendants of a deceased adopted child may inherit from the adopting parent seems never to have been considered. But if an adopted child inherits from the adopting parent just as tho he were a legitimate child, his

212. Revised Statutes 1909, § 1675. When the adopting father dies leaving a widow but without a child or other descendants in being, capable of inheriting, his widow is entitled, among other things, to one-half of the real and personal estate belonging to the husband at the time of his death. An adopted child is a child capable of inheriting within the meaning of this statute. Revised Statutes 1909, § 351; *Moran v. Stewart* (1894) 122 Mo. 295, (1895) 132 Mo. 73, (1903) 173 Mo. 207.

213. See a valuable article by Professor Kales on Rights of Adopted Children, 9 Illinois Law Review 149.

214. *Fosburgh v. Rogers* (1893) 114 Mo. 122; *Clarkson v. Hatton* (1898) 143 Mo. 47.

215. *Burnes v. Burnes* (1905) 137 Fed. 781; *Pemberton v. Perrin* (1913) 94 Neb. 718.

216. *Moran v. Stewart* (1894) 122 Mo. 295; *Waterman v. Schmidt* (1899) 80 Mo. App. 344; *Steele v. Steele* (1901) 161 Mo. 566.

217. Revised Statutes 1909, § 544.

218. *Fugate v. Allen* (1906) 119 Mo. App. 183; *Thomas v. Maloney* (1901) 142 Mo. App. 193; *Horton v. Troll* (1914) 183 Mo. App. 677.

219. *Hockaday v. Lynn* (1906) 200 Mo. 456.

descendants should inherit just as tho they were descendants of a legitimate child. An adopted child cannot inherit lands conveyed to its adopting parent and his bodily heirs, nor is it a child within the meaning of a statute²²⁰ declaring that when a grantee shall become seised of an estate which would be regarded under the law of England as an estate tail the grantee shall have a life estate only and upon his death the land shall go to his children.²²¹ Nor may an adopted child take under a devise "to the nearest and lawful heirs of mine and that of my said wife"; it was held that the testator meant relatives by blood.²²²

It would seem to follow from the decision in *Reinders v. Koppelman*²²³ that an adopted child may inherit from its natural parent, for it was there held that upon the death of an adopted child intestate and childless, its property even tho received by devise from the adopting parent passed to its relatives by blood. If such relatives inherit from it, it is probably true that it may inherit from them.²²⁴ If under the statute providing for the adoption of abandoned children from an institution the adopting parent inherits from the child, it may be that the child cannot inherit from his natural parents as this might result in the transfer of the estate of the natural parents to the adopted parent.

IV SUGGESTED CHANGES IN STATUTES

A revision and redrafting of the statutes both as to legitimation and adoption is desirable. Whether all illegitimate children should be capable of inheriting from their fathers, if recognized, even tho their parents do not subsequently marry, is not altogether a legal question but involves social considerations beyond the scope of this study. The presumption of legitimacy should be given more definiteness than it has now and the sort of evidence which can be used to rebut it should be made clear.

220. Revised Statutes 1855, p. 355, § 5.

221. *Clarkson v. Hatton* (1898) 143 Mo. 47. See 1 Law Series, Missouri Bulletin, p. 21; Kales, Rights of Adopted Children, 9 Illinois Law Review, pp. 149-153.

222. *Reinders v. Koppelman* (1887) 94 Mo. 338.

223. (1878) 68 Mo. 482.

224. Cf. *Burnes v. Burnes* (1904) 132 Fed. 485; *Clarkson v. Hatton* (1898) 143 Mo. 47, 55.

This would involve a consideration of the question as to whether it is desirable to continue or to limit the rule that husband and wife are disqualified to testify as to lack of marital intercourse. The doubts as to the legitimation of adulterine bastards should be settled. There should be some direct means provided for the final determination of the legitimacy of children during the lifetime of those who are most vitally concerned.²²⁵

The statutes permitting adoption do not form a consistent whole as they should. If adoption is worth being preserved, and it undoubtedly is, it would seem desirable that it should be complete in all cases and not partial as it is in some. It should be dependent upon the approval of a court in all cases and not merely in the two instances of the adoption of children having no guardian and of abandoned children under seven if adopted from an institution. The consent of the child, which is not required now in any case, should be required in all cases, if it is old enough to be able to give a consent having any significance. The parents should be made parties to the adoption proceedings, but if this is impossible in any case, a guardian might be appointed to protect the interests of the child. In this way the right to the custody and services of the child will be transferred by every adoption to the adopting parent. In no case should an adoption be permitted unless it is made to appear that it would be for the best interests of the child. These requirements would not unduly restrict the privilege of adoption, but would make it certain that the rights of the child and of its natural parents would be protected, and at the same time the rights and obligations of the adopting parent would be defined.

ELDON R. JAMES.

225. At present the determination of a child's legitimacy is usually postponed until the death of the parent raises a question of inheritance. An indirect method of determining it might be found in a suit by the child's guardian for reimbursement for necessities purchased with the child's money. After *Huke v. Huke* (1891) 44 Mo. App. 308, the court would probably refuse to decree future maintenance. But see *Eldred v. Eldred* (1901) 62 Neb. 613, 87 N. W. 340. There seems to be no way in which the husband of the mother of a child born in wedlock can initiate a proceeding to finally determine the child's legitimacy or illegitimacy.

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NOTES ON RECENT MISSOURI CASES

ADVERSE POSSESSION—MISTAKEN BOUNDARY LINE. *Bartlett v. Boyd*.¹—Two difficult questions arise in boundary line disputes where one person claims to have acquired title to his neighbor's land under the statute of limitations. First, what sort of claim must accompany the possession in order to set the statute into operation? Second, what must be proved by the claimant in order to make out a *prima facie* case against the owner?

Mere possession by one person of another's land is insufficient to set the statute of limitations into operation. It was early established that acts done on another's land will be taken to have been done in subordination to the will of that other unless the contrary is shown.² It is frequently said that an actual disseisin is necessary to make possession adverse and the requirements of a possession which will satisfy the statute have been moulded on the early common law requirements for a disseisin. But the analogy is not to be pushed too far, for in many places it breaks down, as for instance where there is no wrongful entry which was necessary to a disseisin.³ Dis-

1. (1915) 175 S. W. 947.

2. *Blunden v. Baugh* (1832) Croke Car. 302.

3. *Doe d. Parker v. Gregory* (1834) 2 A. & E. 14; *Tiffany, Real Property*, § 436.

seisin involved a hostile claim and to this extent possession must amount to a disseisin in order to be adverse.⁴ This does not mean, however, that the hostile claim must be asserted by the possessor with a knowledge of the rights of the true owner and an intent to subvert them. A claim is hostile if it cannot be justified alongside the rights of the owner.

In several early cases the Missouri Supreme Court seems to have taken the position that there could be no disseisin by unconscious mistake.⁵ In *Knowlton v. Smith*,⁶ it was held that the statute did not run in favor of one who had "no intention of asserting an adverse title." Such a rule would place a premium on dishonesty and reward conscious wrongdoing for persons who were conscious of no wrongdoing would derive no benefit from long continued possession. The consequence of such a rule has been recognized in Missouri in at least boundary line cases, and in *Walbrunn v. Ballen*⁷ and many subsequent decisions⁸ it has been held that a hostile claim may be made by one who believes himself to be the owner of the land which he is claiming.

The adverse possessor must make an unequivocal claim to the land possessed. If for instance a boundary fence is located merely for the purposes of convenience, it is clear that no claim at all is made.⁹ If it is located upon what is supposed to be the true line and if title is claimed to all of the land up to the boundary fence, then the possession is clearly adverse;¹⁰ but if the fence is located by one who believes it to be on the true line but whose assertion of title to the land possessed up to what is believed to be the true line is made only with intent to change the location of the line whenever the error is ascertained, then clearly the possession is not adverse.¹¹ Color of title does not seem to be necessary for the claimant never relies upon constructive possession where a boundary line has actually been established.¹²

4. *St. Louis University v. McCune* (1859) 28 Mo. 481; *Kincaid v. Dormey* (1871) 47 Mo. 337; *McCabe v. Bruere* (1899) 123 Mo. 255, 54 S. W. 450.

5. *Cf. Cutter v. Waddingham* (1855) 22 Mo. 206.

6. (1865) 36 Mo. 507.

7. (1878) 68 Mo. 164.

8. *Cole v. Parker* (1879) 70 Mo. 372; *Golterman v. Schiermeyer* (1892) 111 Mo. 404, 19 S. W. 484; *Hamilton v. West* (1876) 63 Mo. 93; *Flynn v. Wacker* (1899) 151 Mo. 545, 52 S. W. 545; *Davis v. Braswell* (1904) 185 Mo. 576, 84 S. W. 870; *Battner v. Baker* (1891) 108 Mo. 311, 18 S. W. 911.

9. *Hilgedick v. Gruebbei* (1912) 246 Mo. 140, 151 S. W. 731.

10. *Tamm v. Kellogg* (1871) 121 Mo. 482, 26 S. W. 341; *Handlan v. McManus* (1889) 100 Mo. 124, 13 S. W. 207; *Hedges v. Pollard* (1899) 149 Mo. 216, 50 S. W. 889; *Mulligan v. Fritts* (1909) 226 Mo. 189, 125 S. W. 1101.

11. *Keen v. Schnedler* (1886) 92 Mo. 516, 2 S. W. 312; *Finch v. Ullman* (1890) 105 Mo. 255, 16 S. W. 863; *McWilliams v. Samuel* (1894) 123 Mo. 659, 27 S. W. 550; *Roecker v. Haperla* (1897) 138 Mo. 33, 39 S. W. 454.

12. *Mather v. Walsh* (1891) 107 Mo. 121, 17 S. W. 755; *Golterman v. Schiermeyer* (1892) 111 Mo. 404, 19 S. W. 484; *Hedges v. Pollard* (1899) 149 Mo. 216, 50 S. W. 889; *Gloyd v. Franck* (1912) 248 Mo. 468, 154 S. W. 744.

The difficulty arises in determining what is the nature of the claim which is made. Mere possession does not of itself establish a claim of title for without more it should be taken to be in subordination to the rights of the true owner. If the parties have agreed upon a location for the boundary line there is no room for saying that the possession of one is in subordination to the title of the other, hence no further proof of claim of title is necessary.¹³ It would seem that cultivation of the land beyond the true line is not in itself sufficient to establish a claim of title,¹⁴ tho it is probably evidence of a claim. So with the payment of taxes. The evidence of the erection of a substantial and permanent building on the land is probably sufficient proof of a claim of title.¹⁵ Declarations by the possessor are most frequently relied on, but it would seem that they are only evidence of the character of the possession which might in some instances be held to have been in subordination to the will of the owner in spite of the declaration by the possessor that he claimed title.

One who claims land by adverse possession has the burden of proving that the possession was adverse, i.e., that he or his predecessor was in actual, notorious and continuous possession under claim of title for the statutory period.¹⁶ But in *Hedges v. Pollard*,¹⁷ an exception was engrafted on this rule to the effect that the claimant's burden is to show only that he has possessed under an apparent claim of title; and that he need not show his possession was not subject to subsequent ascertainment of the true line, the burden being on the owner to go ahead with such proof after the claimant's burden is discharged. This exception would seem to involve relieving the claimant of the necessity of full proof that his possession was under an unequivocal claim of title. When the claimant has discharged the burden of showing that the circumstances of the possession established an apparent claim of title, the owner has the duty of showing that the claimant's possession was subject to the ascertainment of the true line. This exception seems to have been accepted by the court in *Lemmons v. McKinney*,¹⁸ but it does not seem to have been involved because of an agreement as to the boundary line in that case. In *Gloyd v. Franck*,¹⁹ the defendant had erected a building on part of the plaintiff's lot, which being of a substantial and permanent nature was sufficient

13. *Turner v. Baker* (1876) 64 Mo. 218; *Schad v. Sharp* (1888) 95 Mo. 574, 8 S. W. 549; *Krider v. Milner* (1889) 99 Mo. 145, 12 S. W. 461; *Brum-mell v. Harris* (1901) 162 Mo. 397, 63 S. W. 497.

14. *Crawford v. Aherns* (1890) 103 Mo. 88, 15 S. W. 341; *Ford v. Mc-Annelly* (1908) 215 Mo. 371, 114 S. W. 990.

15. *Hamilton v. West* (1876) 63 Mo. 93; *Mather v. Walsh* (1891) 107 Mo. 121, 17 S. W. 755; *Handlan v. McManus* (1889) 100 Mo. 124, 13 S. W. 207; *Gloyd v. Franck* (1912) 248 Mo. 468, 154 S. W. 744.

16. *Bradley v. West* (1875) 60 Mo. 33; *Lumber Co. v. Cratig* (1912) 248 Mo. 319, 154 S. W. 73 and cases cited.

17. (1899) 149 Mo. 216, 50 S. W. 889.

18. (1901) 162 Mo. 525, 63 S. W. 82.

19. (1912) 248 Mo. 468, 154 S. W. 744.

to establish a claim to title. The court said that the burden of showing that the defendant intended to claim only to the true line wherever that should be ascertained to be, rested on the plaintiff. The reversal of the judgment in that case was placed on an instruction which was erroneous with reference to another part of the lot which was not thus possessed.

As an exception to the general rule that the claimant has the burden of showing that his possession was adverse, there would seem to be no good reason for this doctrine. Perhaps what the court actually means in these cases is not that the burden of proof is on the owner to show that the claimant held subject to an ascertainment of the true line, but that the evidence in each of the cases in which the exception is stated was sufficient to establish the claim of right which would make the possession adverse unless the true owner could offer further evidence which would impugn the unconditional nature of the claim of right. The claimant has the burden of showing by preponderance of evidence that he claims title to the strip possessed at all events. It would seem under the Missouri doctrine that he ought to be held not to have discharged this burden until he has shown that his claim was in no wise subject to a future ascertainment of the true line. But the courts have not consistently held that a possession is not adverse until it is shown not to have been subject to the ascertainment of the true line, and have held that possession may be shown to be adverse, at least sufficiently for a recovery by the claimant, as a result of ordinary proof of a claim of right. It would seem to follow that any suggestions in the evidence of the owner that the claim was subject to a future ascertainment of the true line should be sufficient to enlarge the claimant's duty to include a showing that his possession was not subject to a future ascertainment of the true line. Logically, therefore, if any burden is to be put on the owner, it should be a burden of going forward and not a burden of proof.

In the recent case of *Bartlett v. Boyd*,²⁰ the Supreme Court relied on *Hedges v. Pollard* and *Lemmons v. McKinney* and re-stated the exception that when the possession of either of two adjoining landowners has been held under an apparent claim of exclusive ownership for the statutory period, the burden is upon the other to show that such holding was subject to a future ascertainment of the correct line. But the evidence in *Bartlett v. Boyd* tended very strongly to show that the claimant's possession was adverse, for he had refused to abide by any survey which did not recognize his fence as the true line. It seems clear that he was claiming to own to the fence, so it was unnecessary to hold that the burden of proof that the claim was conditional was upon the owner of the land. The court seems inclined

²⁰. (1915) 175, S. W. 947.

to continue the exception, however, without any recognition of its logical effect in forcing the owner to assist an adverse claimant in proving the adverse character of his possession.

LAURANCE M. HYDE.

EVIDENCE—REPUTATION OF DECEASED. *State v. Ross.*¹ Evidence as to the reputation of the deceased in cases of homicide is usually irrelevant and therefore inadmissible. To this rule there are two exceptions. First, where the issue is self-defense and the character of the killing is doubtful, evidence of the reputation of the deceased as a violent and dangerous man is competent for the purpose of determining whether the deceased was the aggressor.² In these cases, it is immaterial whether the reputation of the deceased was known to the defendant, "for the question is what the deceased probably did, not what the defendant probably thought the deceased was going to do." For the same reason, uncommunicated threats are admissible when there is doubt as to whether the deceased was the aggressor.³ The second exception also arises in cases where the plea is self-defense, and evidence of the reputation of the deceased as a violent and dangerous man may be introduced as bearing upon the reasonableness of defendant's apprehension of danger at the time of the killing, provided that the defendant is shown to have been familiar with the reputation at the time.⁴

Thus only in cases where self-defense is pleaded is evidence of the reputation of the deceased admissible. Accordingly, where the slaying is done with a felonious intent such evidence is not relevant and is therefore inadmissible.⁵ But even in the cases where the deceased's reputation is admissible under a plea of self-defense it seems that the defendant must first put it in issue.⁶ After the defense has attacked the character of the deceased, then the state may rebut by showing his good reputation.⁷ It is often difficult to tell when the defendant has put the deceased's reputation in issue. It seems clear that the

1. (Mo., 1915) 178 S. W. 475.

2. 1 Wigmore, Evidence, § 63; *State v. Hensley* (1886) 94 N. C. 1021, 1082; *De Arman v. State* (1882) 71 Ala. 351, 361. See *State v. Rider* (1886) 90 Mo. 54, 61; 3 L. R. A. (N. S.) 361. But cf. *State v. Feeley* (1905) 194 Mo. 300; *State v. Barrett* (1912) 240 Mo. 161.

3. *State v. Smith* (1901) 164 Mo. 567.

4. 1 Wigmore, Evidence, § 246; *State v. Downs* (1886) 91 Mo. 19 and cases cited; *Horback v. State* (1875) 43 Tex. 242; *Commonwealth v. Tirotinski* (1905) 189 Mass. 257, 75 N. E. 261; *Marts v. State* (1875) 26 Ohio St. 162; *Franklin v. State* (1856) 29 Ala. 17.

5. *State v. Jackson* (1858) 17 Mo. 544; *State v. Byrd* (1897) 121 N. C. 684, 28 S. E. 353 and cases cited; *Commonwealth v. Straesser* (1893) 153 Pa. 451, 26 Atl. 17; *Abbott v. People* (1881) 86 N. Y. 460.

6. *State v. Potter* (1874) 13 Kan. 310, cited with approval in *State v. Reed* (1913) 250 Mo. 379, but in the latter case the deceased was admitted as a witness thru his dying declaration. *Moore v. State* (1904) 46 Tex. Crim. App. 54, 79 S. W. 565; *Jimmerson v. State* (1902) 133 Ala. 18, 32 So. 141.

7. *State v. Feeley* (1906) 194 Mo. 300; *State v. Woodward* (1905) 191 Mo. 617; *Pettis v. State* (Tex. Crim. App., 1904) 81 S. W. 312; *Mitchell v. State* (1902) 133 Ala. 65, 32 So. 182.

state need not wait until the defendant has introduced a witness who specifically testifies that the deceased's reputation was bad.⁸ It has been held sufficient if the defendant attacks deceased's reputation by showing that he was a quarrelsome and dangerous man,⁹ or that he was the aggressor¹⁰ or that he had made threats against the defendant.¹¹ Proof that the deceased was a quarrelsome and dangerous man when drinking was held to warrant the admission of evidence in rebuttal that deceased was a peaceable and law-abiding citizen.¹² But an allegation that deceased tried to rob the defendant at the time of the slaying is not such an attack upon his reputation as to justify the admission of testimony by the state to show deceased's good reputation.¹³

In *State v. Ross*,¹⁴ recently decided by the Missouri Supreme Court, a woman charged with the murder of her husband pleaded insanity. In the lower court the state was allowed, over the objection and exception of the defendant who had not attacked the deceased's reputation, to introduce evidence of the husband's good reputation "as a peaceable, law-abiding, upright, honest, hard-working man". The defense later introduced testimony as to the deceased's bad treatment of the defendant. It is clear from the preceding cases that the state's evidence was clearly inadmissible at the time it was introduced, was "especially so in this case, by reason of the fact that there was no claim by the defendant that the killing was in self-defense, but insanity was relied upon as the sole defense." The Supreme Court held the admission of this evidence reversible error because "such evidence tends to detract the minds of the jury from the principal question."

While there are no cases exactly in point, the principal case seems in line with the following analogous cases. It is reversible error to show the defendant's reputation for violence and turbulence when he has not put his character in issue.¹⁵ It is also fatal error when the testimony is conflicting to show the trustworthiness of a witness before his reputation for truth and veracity has been attacked.¹⁶ Again it is reversible error when the deceased has become a witness through his dying declaration to introduce testimony as to his reputation for peace and quietude when it has not been attacked by the defendant.¹⁷ In the principal case, the court probably treated the defend-

8. *State v. Vaughan* (Nev., 1895) 39 Pac. 733, 735.

9. *Pettis v. State* (1904) 47 Tex. Crim. App. 66, 81 S. W. 312; *State v. Vaughan* (1895) 22 Nev. 285, 39 Pac. 733; *People v. Gallagher* (1902) 78 N. Y. Supp. 5.

10. *Thrawley v. State* (1899) 153 Ind. 375, 55 N. E. 95.

11. *Russel v. State* (1881) 11 Tex. App. 288; *Sims v. State* (1898) 38 Tex. Crim. Rep. 637.

12. *State v. Feeley* (1906) 194 Mo. 300.

13. *State v. Reed* (1913) 250 Mo. 379.

14. (Mo., 1915) 178 S. W. 475.

15. *State v. Beckner* (1905) 194 Mo. 281.

16. *State v. Thomas* (1883) 78 Mo. 327.

17. *State v. Reed* (1913) 250 Mo. 379.

ant's evidence as insufficient to put the deceased's character in issue, in which case the state's evidence was wholly irrelevant and therefore its admission was reason for reversal. Nor was the error cured by the defendant's evidence if it was introduced only for the purpose of rebutting what the state had already erroneously introduced. In *State v. Beckner*,¹⁸ it was held that the error of the state in proving defendant's reputation for violence and turbulence was not cured by the defendant's later introduction of testimony to disprove the same. But if the defendant's testimony was introduced for the purpose of putting deceased's reputation in issue and really was sufficient to put it in issue, then there would seem to be no reason for a reversal, because it would then be only a change in the order of proof and probably would not affect the issues. J. P. HANNIGAN.

HUSBAND AND WIFE—RECOVERY AGAINST SPOUSE FOR TORT COMMITTED DURING COVERTURE. *Rogers v. Rogers*.¹—This was an action for damages for false imprisonment in causing the plaintiff to be committed to, and for several months confined in, an insane asylum. At the time of the commission of the tort, and when the suit was brought the plaintiff was the wife of the defendant. The court denied recovery on the ground that the married women's act does not give such a right of action.

At common law the identity of the wife became merged in that of her husband upon her marriage. In general they were regarded as one person, and that person was the husband². As a consequence neither could contract with nor sue the other.³ The wife's contracts and conveyances were void. In equity, however, the duality of the husband and wife was recognized and whenever the interests of the two were conflicting the wife was allowed to maintain an action against her husband⁴; but only actions relating to property could be maintained. The husband could restrain the liberty of his wife or chastise her at will so far as the non-criminal law was concerned,⁵ tho she could institute criminal prosecution against him.⁶

The identity theory of husband and wife has been restricted by the various married women's acts. These acts⁷ usually allow suits to be brought by and against a married woman with the same force

18. (1905) 194 Mo. 281.

1. (1915) 177 S. W. 382.

2. *Frissell v. Rosier* (1854) 19 Mo. 448; *Lindsay v. Archibold* (1895) 65 Mo. App. 117.

3. *Counis v. Markling* (1875) 30 Ark. 17; *Jennie v. Marble* 37 Mich. 319; *Lindsey v. Archibold* (1896) 65 Mo. App. 117.

4. *Smith v. Smith* (1882) 18 Fla. 789; *Randall v. Randall* (1879) 37 Mich. 573.

5. 1 Blackstone, Commentaries, p. 444.

6. *Fulgham v. State* (1871) 46 Ala. 143; *Lawson v. State* (1902) 115 Ga. 578, 41 S. E. 993.

7. Revised Statutes 1909, §§ 1735, 8304.

and effect as if she were a *feme sole*, and provide that a married woman shall be deemed a *feme sole* so far as to enable her to transact her own business, contract and be contracted with, sue and be sued. Under such statutes the disability to contract with her husband as well as with third persons is removed, and she may maintain an action against her husband in her own name on all contracts entered into with him.⁸ Not only is this true of contracts, but the rule is also the same whenever the husband unlawfully interferes with his wife's property.⁹ Thus she may bring replevin,¹⁰ detinue,¹¹ trover,¹² and ejectment¹³ to protect her property rights. It is interesting to note in this connection that when a statute gives a wife a remedy against her husband at law, the remedy in equity is not superseded.¹⁴

If under the enabling acts a cause of action arises in the wife's favor from wrongful infliction of injury upon her by another, why does not the wrongful infliction of such an injury by her husband give her a cause of action against him? The right to bring such an action is usually denied on the ground of public policy, that it would tend to invade the sanctity of the home and shatter the sacred relations of marriage. The denial of the right is sometimes based on the construction of the married women's acts. These acts vary in different jurisdictions. Some have been held to change the legal status of husband and wife, abolishing their legal identity.¹⁵ Under such an interpretation it is clear that the wife should be able to maintain an action against her husband for personal torts inflicted during coverture and in several recent cases such an action was allowed.¹⁶ The married women's acts are usually interpreted as leaving the marriage status unchanged and as merely providing exceptions to the necessary consequences of the status. This was, in effect, the view taken by the Supreme Court in *Rogers v. Rogers*¹⁷ where the statute was considered as one of procedure, and being in derogation of the common law could not be held to grant any greater power than its terms express. The husband never having had a similar right against the

8. *Montgomery v. Montgomery* (1910) 142 Mo. App. 481, 127 S. W. 118; *Abdott v. Fidelity Trust Co.* (1910) 149 Mo. App. 511, 130 S. W. 1120.

9. *Bruce v. Bruce* (1892) 95 Ala. 563, 11 So. 197; *Cook v. Cook* (1900) 125 Ala. 583, 27 So. 918; *Gillespie v. Gillespie* (1896) 64 Minn. 381, 67 N. W. 206.

10. *Howland v. Howland* (1880) 20 Hun 472; *White v. White* (1885) 58 Mich. 546; *Jones v. Jones* (1865) 19 Ia. 236.

11. *Bruce v. Bruce* (1892) 95 Ala. 563, 11 So. 197.

12. *Ryerson v. Ryerson* (1890) 8 N. Y. Supp. 738; *Whitney v. Whitney* (1867) 49 Barb. 319; *Mason v. Mason* (1892) 21 N. Y. Supp. 306, conversion by wife of husband's property.

13. *Wood v. Wood* (1881) 83 N. Y. 575; *Cook v. Cook* (1900) 125 Ala. 583, 27 So. 918.

14. *Woodward v. Woodward* (1899) 148 Mo. 241, 49 S. W. 1001.

15. *Brown v. Brown* (1914) 88 Conn. 42, 89 Atl. 889; *Fiedeer v. Fiedeer* (Okla., 1914) 140 Pac. 1022.

16. *Schultz v. Schultz* (1882) 63 How. Prac. 81; *Brown v. Brown* (1914) 88 Conn. 42, 89 Atl. 889; *Fiedeer v. Fiedeer* (Okla., 1914) 140 Pac. 1022.

17. (1915) 177 S. W. 382.

wife, the statute was construed to confer on her no greater rights than those possessed by the husband. The result reached is in accord with the prevailing view in other states. Thus no recovery was allowed a wife in assault and battery,¹⁸ slander,¹⁹ malicious prosecution²⁰ and false imprisonment.²¹ Nor is the result different when the action is brought after divorce.²²

The idea that public policy is so opposed to allowing a wife to maintain an action against her husband for personal torts harps back to the worn and hackneyed theory of invading the sanctity of the home and to the favorite bugaboo of increased litigation. It is difficult to perceive how any home in which personal injuries are inflicted can have any tone of sanctity. The denial of a recovery will not prevent the injuries. On the contrary it may conduce to the infliction of them. It is true that the rule prevents an exposure of domestic dissensions, but will they not be as fully exposed in a divorce action or a criminal proceeding? That to allow the wife an action for damages against her husband for personal injuries would increase litigation is a weak and unavailing argument. Such an increase can produce no harm if the litigation is necessary for the redress of real injuries. The Supreme Court in *Rogers v. Rogers*²³ did not base its decision on public policy, but upon the ground that the statute²⁴, whether construed as a declaration of substantive rights or as a rule of procedure should not be construed to grant any greater power than its terms express. Another section²⁵ expressly declares what actions a married woman may maintain. It refers to contracts and property rights but not to torts. The court in construing this section held that it conferred no greater rights upon the wife than those possessed by the husband, and since he never had the right to recover from his wife for personal torts, she cannot maintain such an action against him.

It is clear that the married women's acts in Missouri are not broad enough to confer upon the wife the right contended for in *Rogers v. Rogers*. These acts are the result of the changed economic and social

18. *Peters v. Peters* (1875) 42 Ia. 182; *Lobby v. Berry* (1883) 74 Me. 286; *Strom v. Strom* (1906) 98 Minn. 427, 107 N. W. 1047; *Logendyke v. Logendyke* (1863) 44 Barb. 367; *Abbe v. Abbe* (1897) 48 N. Y. Supp. 25; *Sykes v. Spear* (1908) 102 Tex. 451, 112 S. W. 422; *Thompson v. Thompson* (1910) 218 U. S. 611.

19. *Freethy v. Freethy* (1865) 42 Barb. 641; *Mink v. Mink* (1895) 16 Pa. Co. Ct. 189; *Young v. Young* (Scotland, 1903) 5 Faculty Decisions 330.

20. *Tinkley v. Tinkley* 24 Times L. R. 691.

21. *Abbott v. Abbott* (1877) 67 Maine 304; *Main v. Main* (1891) 46 Ill. App. 106. *Contra: Brown v. Brown* (1914) 88 Conn. 42, 89 Atl. 889; *Fiedeer v. Fiedeer* (Okla., 1914) 140 Pac. 1022.

22. *Phillipps v. Barnett* (1876) 1 Q. B. D. 436; *Peters v. Peters* (1875) 42 Ia. 182; *Abbott v. Abbott* (1877) 67 Me. 304; *Lobby v. Berry* (1883) 74 Me. 286; *Bandfield v. Bandfield* (1898) 117 Mich. 80, 75 N. W. 287; *Strom v. Strom* (1906) 98 Minn. 427, 107 N. W. 1047. *Freethy v. Freethy* (1865) 42 Barb. 641; *Logendyke v. Logendyke* (1863) 44 Barb. 366; *Nickerson v. Nickerson* (1886) 65 Tex. 281.

23. (1915) 177 S. W. 382.

24. Revised Statutes 1909, § 1735.

25. Revised Statutes 1909, § 8304.

conditions under which a married woman is no longer to be restricted in the use of her property. The common law rule denying the wife a tort action against her husband is as much unsuited to present conditions as the disabilities which prevailed before the adoption of the married women's acts, and it would seem that a change is desirable. But the statute has not made it, and the rule of the common law is too plain for it to be made except by the legislature. The question then arises whether, if the change be made, any present rules of evidence would so restrict the right as to render it of little or no value.

From early times a husband and wife have been incompetent to testify for or against each other. The rule rests on the common law theory of identity and on the ground of public policy that to allow one to testify in favor of or against the other would conduce to family discord and dissension destroying the sanctity of the home. Whatever may be the reason for the rule, it prevails in Missouri notwithstanding the statute removing the disqualification of interest.²⁶ Thus in civil actions a wife or husband is incompetent to testify either in behalf of or against the other in cases in which either is a party to the record, or not being a party, has some beneficial interest in the result.²⁷ This rule was not followed in two instances where public policy was altered by the necessities of justice. In a civil action against a dramshop keeper for selling plaintiff's husband liquor, the husband was allowed to testify.²⁸ A wife was held competent to testify in behalf of her husband in an action by him against a doctor for producing an abortion on her.²⁹ By statute³⁰ a wife cannot testify concerning admissions or conversation made by her husband either to her or to third persons. Nor are declarations made by a wife to third persons admissible against her husband.³¹ In divorce proceedings, of course, the incompetency does not exist. In any case in which both husband and wife are interested either may testify tho it inures to the benefit of the other.³²

The rule is different in criminal cases. By statute³³ the disqualification by reason of being husband or wife is removed to the extent that either may testify in favor of the other at the option of the one accused. Without the defendant's consent, however, the

26. Revised Statutes 1909, § 6354.

27. *Smoot v. Judd* (1901) 161 Mo. 673, 61 S. W. 854; *Orchard v. Collier* (1902) 171 Mo. 390, 71 S. W. 677; *Layson v. Cooper* (1903) 174 Mo. 211, 73 S. W. 472; *Berst v. Mozem* (1911) 157 Mo. App. 342, 138 S. W. 74; *Conn. Fire Ins. Co. v. Chester etc. Ry. Co.* (1913) 171 Mo. App. 70, 153 S. W. 544.

28. *Pettis County v. DeBold* (1908) 136 Mo. App. 265, 117 S. W. 88.

29. *Cramer v. Hurt* (1900) 154 Mo. 112, 55 S. W. 258.

30. Revised Statutes 1909, § 6359; *State v. Louts* (1905) 186 Mo. 122, 84 S. W. 906.

31. *State v. Richardson* (1905) 194 Mo. 326, 92 S. W. 649.

32. *Toovey v. Baxter* (1894) 59 Mo. App. 470; *Layson v. Cooper* (1902) 174 Mo. 223; 73 S. W. 472; *Pace v. St. Louis S. W. Ry. Co.* (1913) 124 Mo. App. 227, 156 S. W. 746.

33. Revised Statutes 1909, § 5242.

other is incompetent.³⁴ This is true as to offenses committed before the marriage takes place³⁵ and as a result the prosecuting witness has occasionally been rendered incompetent to testify by reason of her marriage to the accused. There is an exception to the rule of incompetency of husband or wife as witnesses in criminal cases. As has been pointed out above, one spouse cannot maintain an action against the other for personal injuries, but the injured one could gain relief in a criminal prosecution. Thus for all personal injuries criminal in their nature inflicted by one spouse upon the other a criminal prosecution may be maintained in which either is competent to testify against the other.³⁶ This exception represents an attempt to escape the rigor of the rule denying the wife a recovery for such injuries in a tort action, and is allowed by reason of the necessity that otherwise the wife would be without protection. It is extended no further than that necessity requires, hence it is confined to cases of personal violence endangering bodily safety or liberty.³⁷ Desertion, however, is considered such a crime against the wife as to admit her testimony against the husband.³⁸

Divorce does not entirely remove the disqualification. In *Toovey v. Baxter*,³⁹ the court held that a divorced wife was a competent witness in a civil action in which her former husband was a party, except as to communications between them while the marital relations existed. On the other hand, a divorced wife is not a competent witness against her former husband in a criminal prosecution for a crime committed on third persons during the marriage. This is true not only of conversation had between them, but of any facts witnessed by her.⁴⁰ It appears from the decisions that the wife of a deceased husband is a competent witness in an action against her husband's estate concerning all knowledge derived wholly by the exercise of her sense of sight, but not as to conversations or admissions made by her husband either to her or to third persons.⁴¹

This summary of the existing law leaves it clear that no change of the rules of evidence is necessary in order to clothe the wife with an effective right of recovery against her husband for a personal tort. It is submitted that public policy necessitates such action by the legisla-

34. *State v. Willis* (1893) 119 Mo. 485, 24 S. W. 1008; *State v. Burlingame* (1898) 146 Mo. 207, 48 S. W. 72; *State v. Wooley* (1908) 215 Mo. 620, 115 S. W. 417.

35. *State v. Evans* (1896) 138 Mo. 117, 39 S. W. 462.

36. *State v. Arnold* (1874) 55 Mo. 89; *State v. Willis* (1893) 119 Mo. 485, 24 S. W. 1008; *State v. Pennington* (1894) 124 Mo. 388, 27 S. W. 1106. Cf. *State v. Witherspoon* (1910) 231 Mo. 706, 133 S. W. 323. But see *State v. Berlin* (1868) 42 Mo. 572.

37. *State v. Pennington* (1894) 124 Mo. 388, 27 S. W. 1106.

38. *State v. Newberry* (1869) 43 Mo. 429; *State v. Bean* (1904) 104 Mo. App. 255, 78 S. W. 640.

39. (1894) 59 Mo. App. 470.

40. *State v. Kodat* (1900) 158 Mo. 125, 59 S. W. 73.

41. *Shanklin v. McCracken* (1897) 140 Mo. 348, 41 S. W. 898; *Brown v. Patterson* (1909) 224 Mo. 639, 124 S. W. 1.

ture and that a simple addition to the statute ⁴² can accomplish this result effectually.

G. L. DOUTHITT.

LOST CHATTELS—FINDER'S RIGHT TO POSSESSION. *Foster v. Fidelity Safe Deposit Co.*¹—The distinction between lost and misplaced chattels seems to have attained a fixed place in our law, tho it has little in principle to support it. Goods are not lost if they have been put in a place intentionally tho the place has been forgotten by all who had anything to do with putting them in it. To be lost, goods must be so situated as to justify the assumption that they have been unintentionally and involuntarily permitted to be where they are.² Direct proof as to whether a chattel is lost is in most cases impossible and the determination must usually rest upon the inference to be drawn from the location and position of the chattel at the time it is found. A pocket book³ or a whip⁴ discovered upon a counter in a shop, or a pocket book placed on a table in a shop by a customer⁵ or a pocket book discovered on a customer's desk in a banking room⁶ has been treated as misplaced property, not lost. In *State v. McCann*⁷ it was held that a pocketbook discovered on a counter in a store was not lost but misplaced property and as such, even tho the owner was unknown, it could be feloniously taken. It is assumed in such cases that the articles were voluntarily and intentionally placed and it has been uniformly held that the owner of the realty on which the article is misplaced has a better right to it than the one who discovers it,⁸ because of his prior possession.

At common law the finder of lost property has no right as against the owner and he is liable only for gross negligence in the care of it.⁹ But as to the rights of a finder against a third person, it is often broadly stated that the former is entitled to the lost chattels as against all persons except the true owner.¹⁰ When the finder gives the found chattel to a third disinterested party for safe keeping until the owner is traced, the finder may recover possession of it from the third party.¹¹ Lost property found in a public or quasi-public place goes to the finder

42. Revised Statutes 1909, § 8304.

1. (Mo., 1915) 174 S. W. 376.

2. *Lawrence v. State* (1839) 1 Humphrey (Tenn.) 228; *Loucks v. Gallogly* (1892) 23 N. Y. Supp. 126. See *Kuykendall v. Fisher* (1906) 61 W. Va. 87, 56 S. E. 48.

3. *McAroy v. Medina* (1866) 11 Allen (Mass.) 548.

4. *People v. McGarren* (1857) 17 Wend. (N. Y.) 460.

5. *Lawrence v. State* (1839) 1 Humphrey (Tenn.) 228.

6. *Kincaid v. Eaton* (1867) 98 Mass. 139.

7. (1835) 19 Mo. 249.

8. *Loucks v. Gallogly* (1892) 23 N. Y. Supp. 126; *McAroy v. Medina* (1866) 11 Allen (Mass.) 548; *Kincaid v. Eaton* (1867) 98 Mass. 139.

9. *Dougherty v. Posegate* (1856) 3 Iowa 88.

10. *Pinkham v. Gear* (1826) 3 N. H. 484; *Williams v. State* (1905) 165 Ind. 472, 75 N. E. 875.

11. *Tancil v. Seaton* (1877) 28 Grattan (Va.) 601; *Williams v. State* (1905) 165 Ind. 472, 75 N. E. 875; *Amory v. Delamirie* (1822) 1 Str. 505.

instead of the owner of the place in which it is found. To illustrate, money found on the floor of a barber shop¹² or a pocketbook found by a servant of a hotel in one of the parlors,¹³ goes to the finder rather than to the person on whose premises it is found. The finder's right is based on his possession of the chattel and on the fact that no one else at the moment of finding had possession of it.

When, however, the lost property is found on private premises there is a conflict of authority as to whether the owner of the *locus in quo* or the finder is entitled to it. In *Burdick v. Cheseborough*,¹⁴ it was held that altho the finder is rightfully on the private premises, the owner of the premises is entitled to the found goods. It appeared that the article was found embedded in the realty. The owner of the land was given the property on the ground that it had become a part of the realty. Like facts appeared in *South Staffordshire Water Co. v. Sharman*¹⁵ and in *Ferguson v. Ray*¹⁶ and in *Elwes v. Briggs Gas Co.*,¹⁷ but the decision in favor of the owners of the *locus in quo* was rested on the ground that their possession of the realty gave them possession of everything on it and not because the found chattels had become a part of the realty. *McDowell v. Ulster Bank*,¹⁸ in which the porter of defendant found some bank notes on the floor while sweeping out after closing hours, did not allow the finder to recover, but this was because finding articles on the floor in such a way was an incident to his employment. The decision in *South Staffordshire Co. v. Sharman* could be rested on this ground but such an explanation was not suggested in the opinion.

There are several cases denying that the owner of private premises is entitled to the chattel found thereon as against the finder. In *Bowen v. Sullivan*,¹⁹ an employee in defendant's paper mill found an envelope of bills in a bundle of papers bought by the defendant and was held to be entitled to them as against the defendant. *Danielson v. Roberts*,²⁰ *Weeks v. Hackett*²¹ and *Robertson v. Ellis*²² hold that a person who is rightfully on private premises and who finds treasure trove thereon, is entitled to it as against the owner of the *locus in quo*. These cases, however, are to be distinguished on the ground that they deal with treasure trove, and the common law rule is that in the event the owner is not found, treasure trove goes to the crown. *Weeks v. Hackett* holds that the distinction between treasure trove and lost goods has been abolished. Only one of the cases, however, cited as

12. *Bridges v. Hawkesworth* (1852) 7 Eng. L. & Eq. 425.

13. *Hamaker v. Blanchard* (1879) 90 Pa. St. 377.

14. (1904) 94 N. Y. App. Div. 532, 88 N. Y. Supp. 13.

15. (1896) 2 Queen's Bench 44.

16. (1904) 44 Oregon 557, 77 Pac. 600.

17. (1886) 33 Ch. Div. 562.

18. (1899) 33 Irish Law Times 225.

19. (1878) 62 Ind. 281.

20. (1904) 44 Oregon 108, 74 Pac. 913.

21. (1908) 104 Me. 264, 71 Atl. 858.

22. (1911) 58 Oregon 219, 114 Pac. 100.

sustaining this contention is in point. This case is *Danielson v. Roberts*, where it is expressly said that this question has never been decided in this country and that it is not necessary to decide it in this case. *Roberson v. Ellis* is the only case which squarely holds that this distinction has been abolished. Dicta in these last three cases indicate that the same rule would apply even tho the goods found were lost property instead of treasure trove. Certainly the cases holding that the finder under such circumstances is entitled to the property are not correct according to principle. His rights are based solely on his possession, and start from the absence of any *de facto* control at the moment of finding.²³ Possession or *de facto* control in some one else at the time of finding should, therefore, defeat the finder's right resulting from his possession.

The question of a finder's right to possession as against the owner of the premises on which a chattel is found does not seem to have squarely arisen in Missouri. *Hoagland v. Highland Park Amusement Co.*²⁴ is frequently cited for the proposition that the finder is entitled to possession against the owner of the premises; but the action was for a personal injury inflicted on the finder by the owner of the park and his servants, in arresting him and ejecting him from the park. An erroneous instruction was given by the trial court, in reviewing which the court intimated that the finder was entitled to possess the chattel found on the ground. But the decision may be rested on the ground that the treatment of the finder was not justified even tho he was not entitled to the possession and the instruction was erroneous apart from the statement as to the duty on the owner of the premises to exercise reasonable care to protect the chattel for the owner.

As regards the finder's rights, the distinction between lost and misplaced goods is wholly arbitrary. His right to possession depends upon whether any person other than the owner can show a prior possession. This was the real basis for the decision in *South Staffordshire Water Co. v. Sharman* and the line of cases cited in accord with it. Whether goods are lost or misplaced, the right to possession would seem to depend on the absence of a prior possession in some one else than the owner. And if this distinction were followed logically, there would seem to be no reason for the distinction between lost and misplaced chattels.

In Missouri the rights of a finder of a chattel, the value of which is ten dollars or more have been enlarged by statute.²⁵ In addition to providing a statutory method by which notice of the finding must be given and to fixing a penalty for failure to give such notice, the statute also provides that if the owner does not appear within one year from

23. Pollock & Wright, *Possession in the Common Law*, p. 40.

24. (1902) 170 Mo. 335.

25. Revised Statutes 1909, §§ 8268-8273.

the date of publication in the newspaper and if the value of the found chattel exceeds twenty dollars, "the same shall vest in the finder" and the owner shall have no right to it thereafter. But no statutory period is set for the acquisition of title as against the owner when the value is between ten dollars and twenty dollars. The statute does not in terms deal with the rights of finders against other persons than the owner.

In *Foster v. Fidelity Safe Deposit Co.*,²⁶ the plaintiff, a customer of defendant, discovered an envelope of paper bills, on the corner of a table in one of defendant's private rooms, the door to which was always kept locked and to which only certain customers had access. The court held that the envelope being found on the table was not lost property, that it was in defendant's possession and under the protection of its house and hence the defendant had a better right to its possession than did the plaintiff. In this holding the decision is in accord with the cases above cited on this point. But the court further says that "if the money was lost in a legal sense, the defendant has no sort of possession of it" and admits in such a case the finder would be entitled to it. It is difficult to understand why the defendant's possession of the chattel should depend on whether it was involuntarily or voluntarily placed on its premises. Altho the location of the envelope was unknown to the bank, "the intent to exclude others from it may be contained in the larger intent to exclude others from the place where it is."²⁷

It is to be hoped that this dictum in *Foster v. Fidelity Trust Co.*, in line with the court's clear intimation in *Hoagland v. Forest Park Amusement Co.*, will not be followed when a case arises in which it is actually involved. It is submitted that the holding of the English court in *South Staffordshire Water Co. v. Sharman* is better founded in reason and in public policy.

GARDNER SMITH.

PROCESS—EFFECT OF MISNOMER IN SERVICE BY PUBLICATION. *Brown v. Peak*.¹—If a person has used an adopted or a fictitious name by which he can be sufficiently identified as a consequence of his user, he may be sued by that name.² An improper or insufficient naming of a defendant in service of process presents little difficulty where the defendant is served personally. He is thereby informed that he is the person intended to be sued and unless he takes advantage of the defect

26. (Mo., 1915) 174 S. W. 376.

27. Holmes, Common Law, p. 222.

1. (1915) 177 S. W. 645.

2. *Sparks v. Dispatch Transfer Co.* (1891) 104 Mo. 531, 15 S. W. 417; *Radley v. Meek* (1914) 178 Mo. App. 238, 165 S. W. 1192; *Tuggle v. Bank of Cave Spring* (1910) 8 Ga. App. 291, 68 S. E. 1070; *Clark v. Clark* (1878) 19 Kan. 522; *Union Brewing Co. v. Interstate Bank Co.* (1909) 240 Ill. 454, 88 N. E. 997; *Gilligan v. Casey* (1912) 205 Mass. 26, 91 N. E. 124; *Robbins v. Midkiff* (1907) 46 Tex. Civ. App. 272, 102 S. W. 430; *Gottlieb v. Shapiro* (1909) 136 App. Div. 1, 120 N. Y. Supp. 210.

in the service by plea in abatement, a judgment rendered against him will be valid.³ The jurisdiction in such a case depends upon the actual service of the process and a slight inaccuracy in naming a party becomes immaterial.

But where the only notice is by publication and the defendant does not appear personally, the naming of the defendant is the life of the notice and the jurisdiction of the court depends upon its sufficiency. Unless the name is fully and correctly set forth the published notice is ineffectual,⁴ with certain exceptions to be hereafter noted. For this purpose the full name consists of the first Christian or given name and the surname or patronymic, both of which taken together constitute the legal name of a person. The middle name or initial is no part of a legal designation and may therefore be omitted. Even the insertion of a wrong middle name or initial is harmless. Accordingly, in *Beckner v. McLinn*⁵ where a defendant named Mary Ann Byers had been described in the order of publication as "Mary E. Byers", it was held that she was properly notified. But in *Steinmann v. Strimple*⁶ it was held that an order of publication in an action to foreclose a mechanic's lien was void because the defendant Joab Strimple was named as "J. Strimple". So in *Vincent v. Means*,⁷ it was held that a judgment against "M. C. Vincent" was void as against Minos C. Vincent. Nor will a nickname serve in the place of a Christian name, even tho it is unmistakable, for in *Ohlmann v. Clarkson Sawmill Company*⁸ it was held that notice directed to "Mike Ohlmann" was insufficient to give the court jurisdiction against Michael Ohlmann. *Cruzer v. Stephens*⁹ seems to be out of line with these cases. There in a suit for taxes, notice by publication had been directed to "Etta R. Fisher and ——— Fisher, her husband," and the judgment against the husband was held to be good against collateral attack. It would be difficult to justify such a decision if direct attack had been made on the judgment and in view of the cases above cited, *Cruzer v. Stephens* seems to stand by itself.

3. *Parry v. Woodson* (1886) 33 Mo. 347; *Skelton v. Sackett* (1886) 91 Mo. 377, 5 S. W. 874; *Corrigan v. Schmidt* (1895) 126 Mo. 304, 311, 28 S. W. 874; *State ex rel. Ziegenheln v. Burr* (1898) 143 Mo. 209, 44 S. W. 1045; *Roberts v. Stone* (1903) 99 Mo. App. 425, 431, 73 S. W. 388; *Pond v. Ennis* (1873) 69 Ill. 341; *Lyon v. Crew Levick Co.* (1896) 63 Ill. App. 329; *Lindsey v. Delano* (1889) 78 Iowa 350, 43 N. W. 218; *First National Bank v. Jaggers* (1869) 31 Md. 38, 100 Am. Dec. 53; *Alabama v. Vicksburg Ry. Co.* (1891) 69 Miss. 262, 13 So. 844. Cf. *Howard v. Brown* (1906) 197 Mo. 36, 95 S. W. 191.

4. *Gillingham v. Brown* (1905) 187 Mo. 181, 85 S. W. 1113; *Evarts v. Missouri Lumber Co.* (1906) 193 Mo. 433, 92 S. W. 373; *White v. Gramley* (1911) 236 Mo. 647, 139 S. W. 127. Cf. *Proctor v. Smith* (1909) 220 Mo. 104, 119 S. W. 409.

5. (1891) 107 Mo. 277, 17 S. W. 819. See also *Morrison v. Turnbaugh* (1905) 192 Mo. 427, 91 S. W. 152; *Howard v. Brown* (1906) 197 Mo. 36, 95 S. W. 191.

6. (1888) 29 Mo. App. 478, 484.

7. (1904) 184 Mo. 327, 82 S. W. 96.

8. (1909) 222 Mo. 62, 120 S. W. 1155.

9. (1894) 123 Mo. 337, 27 S. W. 557. Cf. *Root v. Fellowes* (1850) 6 Cush. 29.

On account of the arbitrary orthography and pronunciations given to proper names and the variant spellings in common use the courts have formulated the doctrine of *idem sonans* in dealing with this question of misnomer. In *Graton v. Holliday-Klotz Land Co.*¹⁰ the Supreme Court stated the "accepted doctrine" to be "that names are *idem sonans* if the attentive ear finds difficulty in distinguishing them when pronounced, or common and long continued usage has by corruption or abbreviation made them identical in pronunciation." Where there is a doubt as to the applicability of the doctrine of *idem sonans*, the identity of pronunciation becomes a question of fact to be determined by evidence of the pronunciation.¹¹ Since the method of attaining jurisdiction by substituted or constructive service is exceptional, a few jurisdictions have taken the position that if service by publication is made under the wrong name it will not be validated by resort to the doctrine of *idem sonans*.¹² Generally, no such exception prevails for the service is upheld without any discussion as to the applicability of the doctrine in such cases.¹³

It is well settled that the use of the initials of the Christian name is not sufficient for the purpose of notice by publication. But in *McDermott v. Gray*¹⁴ the court admitted the possibility of exceptions to this general rule based on what may be termed a loose estoppel, and it was held that where a man had secured a marriage license which described him as "A. H. Gray" and had been married by the same initials and had cashed checks and transacted other business as "A. H. Gray," such designation in a suit for divorce was sufficient. And so in *Elting v. Gould*¹⁵ a judgment in a tax suit was held valid tho based upon service by publication which designated the owner by the initials of his given name, where his name was so written in the recorded deeds to the land. The statute¹⁶ which provides that suits for delinquent taxes "shall be prosecuted against the owner of the property, if known, and if not known, then against the last owner of record", was not referred to in this early case; but in later cases¹⁷ it seems to have influenced the court in sustaining the theory of estoppel there advanced.

10. (1905) 189 Mo. 322, 87 S. W. 37. Cf. *Williams v. Grudier* (1915) 264 Mo. 216, 174 S. W. 213.

11. *Gorman v. Dierkes* (1834) 3 Mo. 576; *Geer v. Missouri Lumber Co.* (1896) 134 Mo. 85, 34 S. W. 1099; *Munkers v. State* (1899) 87 Ala. 94, 6 So. 357; *Galveston H. & S. A. Ry. Co. v. Sanchez* (1901) 26 Tex. Civ. App. 536, 65 S. W. 893.

12. *Hubner v. Reickhoff* (1897) 103 Iowa 368, 72 N. W. 540; *Schoenfeld v. Bourke* (1909) 159 Mich. 139, 123 N. W. 537.

13. *Graton v. Holliday Land Co.* (1905) 189 Mo. 322, 87 S. W. 37; *Davison v. Banker's Life Assn.* (1912) 166 Mo. App. 625, 150 S. W. 713; *Grober v. Clements* (1903) 71 Ark. 568, 75 S. W. 555.

14. (1906) 198 Mo. 266, 95 S. W. 431.

15. (1888) 96 Mo. 535, 9 S. W. 922. Cited with approval in *Turner v. Gregory* (1899) 151 Mo. 100, 52 S. W. 234; *Ohlman v. Clarkson Sawmill Co.* (1909) 222 Mo. 52, 120 S. W. 1155; *White v. Himmelberger-Harrison Lumber Co.* (1912) 240 Mo. 13, 139 S. W. 535; *Brown v. Peak* (1915) 177 S. W. 645.

16. Revised Statutes 1909, § 11498.

17. *Stevenson v. Brown* (1915) 264 Mo. 182, 188, 174 S. W. 414.

In *Turner v. Gregory*¹⁸ the leading case on this question, it is laid down that in constructive service the real record name of the land owner in which he took title, as distinguished from the colloquial name he was known by in the neighborhood of the land and to which he answered among those who knew him, must be used in designating him in an order of publication in a tax suit. Turner's record name was "Singleton V. Turner"; the "V" in his name stood for "Vaughn". Where he lived, he was usually called "Vaughn". He was sued for taxes as "Vaughn Turner". It was held that "where resort is had to this method, a substantial even rigid, observance of the law is required, otherwise the judgment is void." In *White v. Himmelberger-Harrison Lumber Co.*,¹⁹ the grantee was designated as "O. H. P. Williams"; the recorder in copying the deed, by mistake wrote the initials "O. N. P.", changing the middle initial from "H." to "N". Thereafter in a suit for delinquent taxes upon notice by publication to "O. N. P. Williams" it was held that as the owner "Williams" took the deed by his initials, the rule that a mistake in the middle initial is immaterial applied. In *Stevenson v. Brown*,²⁰ where land recorded in the name of "Martha E. Stevenson" was sold under judgment predicated upon service by publication directed to "M. E. Stevenson", it was proved that she had at other times taken land by her initials, but the court unanimously held that while a person whose recorded deed designated her by her initials only is estopped to deny the validity of a judgment in a proceeding in which she is designated by such initials, no such estoppel arises from the fact that she has taken title to other land by deeds describing her by her initials only. It was held that the tax judgment was void for want of jurisdiction and that "the tax deed falls with the judgment." When, therefore, the question of the sufficiency of an order of publication directed to "W. G. Easley" was recently presented to the Supreme Court in *Russ v. Hope*,²¹ the latest case on this subject, it looked to the record and found that the record owner was "William G. Easley", and held that such publication did not confer jurisdiction upon the court, and that the sheriff's deed based upon a sale under judgment rendered would not convey the title of "William G. Easley."

*Mosely v. Retley*²² stands alone and in striking contrast with the decisions above noted. There notice by publication was directed to "C. T. Clements" in a suit for taxes on land which was recorded in the name of "Charles T. Clements," and a sheriff's deed given under the judgment in the suit purported to convey the title of "C. T. Clements". The plaintiff who claimed under a quit-claim deed signed

18. (1899) 151 Mo. 100, 103, 52 S. W. 234.

19. (1912) 240 Mo. 13, 139 S. W. 553.

20. (1915) 264 Mo. 182, 187, 174 S. W. 414.

21. (1915) 178 S. W. 447.

22. (1894) 126 Mo. 124, 28 S. W. 895.

"C. T. Clements" brought ejectment against one who claimed under the sheriff's deed and judgment was given for the defendant.²³ In the opinion of the court the judgment was, however, based upon the ground that service by publication directed to "C. T. Clements" was a sufficient notice, inasmuch as if he had appeared personally and defended an action in which he was served by an improper Christian name judgment would have bound him. The court failed to draw the distinction between service by publication and personal service which is noted above, and the argument of the court in *Mosely v. Reiley* would have necessitated a different result in *Elting v. Gould* and in the numerous cases which have followed it. In the subsequent references to *Mosely v. Reiley*,²⁴ the case has invariably been distinguished from cases of the *Elting v. Gould* type on the ground that by executing a deed in the same initials which were employed in the service by publication in the tax suit, the defendant in the tax suit had estopped himself from denying the validity of the judgment in the tax suit and the deed executed in compliance with it and that this estoppel was effectual against such defendant's grantees. This is the explanation of *Mosely v. Reiley* which is given in the opinion of the court in *Brown v. Peak*,²⁵ but it is manifestly unsound in view of the fact that in *Mosely v. Reiley* the court had no jurisdiction at the time the judgment was rendered and no later act of the defendant in the tax suit could validate the void judgment and deed given in compliance with it.

In the recent case of *Brown v. Peak*,²⁵ the question of the effect of misnomer in service by publication was again before the Supreme Court. Certain land was conveyed by a deed duly recorded, in which the grantee was designated as "A. Willard Humphreys". Thereafter suit for taxes was commenced against Humphreys, a non-resident, based upon service by publication which, altho the fact does not clearly appear in the report of *Brown v. Peak*, was probably directed to "A. W. Humphreys" and under a judgment for taxes rendered in that suit, a sheriff's deed was executed which purported to convey the title of "A. W. Humphreys". The plaintiff in *Brown v. Peak* claimed under the grantee named in the sheriff's deed and sought to quiet title against the defendant who claimed under a quit-claim deed executed by "A. W. Humphreys" subsequently to the execution of the sheriff's deed. *Brown v. Peak*, therefore, differs from *Mosely v. Reiley* in that the record title was in the name of A. Willard Humphreys, whereas in *Mosely v. Reiley* the record title was in the name of Charles T.

23. As precedent for its holding the court cited *Martin v. Barron* (1866) 37 Mo. 300, in which it appears that the defendant was personally served, which distinguishes it from the case the court was then considering.

24. *Turner v. Gregory* (1899) 151 Mo. 100, 106, 52 S. W. 234; *Burkham v. Maneuall* (1906) 195 Mo. 500, 507, 94 S. W. 520; *Ohlmann v. Clarkson Sawmill Co.* (1909) 222 Mo. 62, 67, 120 S. W. 1155. But see *Rifle v. Ozark Land & Lumber Co.* (1902) 93 Mo. App. 41, 45, 46.

25. (1915) 177 S. W. 645.

Clements. In the opinion by BOND, J., which was adopted as the opinion of the court, *Mosely v. Reiley* was said to be "directly in point" and was made the chief basis for holding that the sheriff's deed conveyed a good title against one claiming under the quit-claim deed. But a majority of the court stated very clearly that *Mosely v. Reiley* is wrong and ought to be overruled. It would seem, therefore, that *Brown v. Peak* offers no strength to the doctrine of *Mosely v. Reiley* and the actual judgment in *Brown v. Peak* may be justified wholly independently of *Mosely v. Reiley* on the ground that since the middle name and initial can be entirely neglected, following the principle behind the decisions of *Elting v. Gould*,²⁶ *Turner v. Gregory*,²⁷ *Morrison v. Turnbaugh*,²⁸ and *White v. Himmelberger-Harrison Lumber Co.*,²⁹ the initial A. was a sufficient designation in the sheriff's deed since that initial appears in the recorded deed to Humphreys in place of the first Christian name. It is surprising that this point was not noticed in the opinion adopted by the court for it seems to have been the basis of the concurring opinion by BROWN, J. The majority of the court seems to have endeavored to bolster up the result with the suggestion that the letter A may have been the full first Christian name of Humphreys either because no evidence of any other full Christian name was offered or because Humphreys had substituted it for some other full Christian name by reason of his user. This suggestion is entitled to less weight because it is not shown that Humphreys had used the letter A instead of his first name in any other instance than in taking the title to the land in question and in executing the quit-claim deed under which the defendant claims. It should also be noted that a period was used after the letter A, which clearly indicates that it was used by Humphreys as an initial, tho of course it would be possible for one to adopt both a letter and a period as his name. It is to be regretted that *Mosely v. Reiley* was not overruled in *Brown v. Peak* in view of the fact that the latter case may be rested on an independent ground; but since four of the seven judges have indicated their disapproval of *Mosely v. Reiley* and their willingness to overrule it, the way should now be clear to a complete repudiation of the doctrine that the execution of a quit-claim deed subsequently to the execution of a sheriff's deed based on a judgment which is void because of a defect in the service of publication which renders the court without any jurisdiction, estops the defendant in a tax suit from setting up what would otherwise be a good title.

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- 26. (1888) 96 Mo. 535, 9 S. W. 922.
- 27. (1899) 151 Mo. 100, 52 S. W. 234.
- 28. (1905) 192 Mo. 427, 91 S. W. 152.
- 29. (1912) 240 Mo. 13, 139 S. W. 553.

SEALS—EFFECT OF STATUTE ABOLISHING USE OF PRIVATE SEALS. *State ex rel Spellman v. Parke-Davis & Co.*¹—By the early common law, a seal was an impression upon wax or some other tenacious substance.² But the tendency has long been toward a relaxation in the requirements for a seal. An impression of a seal made on the paper of an instrument which purports to be under seal makes the instrument a specialty.³ If a piece of paper is cut out and affixed to a wafer or mucilage on the deed, that is by common law a sufficient sealing of the instrument. The impression is not required to be apparent.⁴ When a commissioner empowered to execute a deed to county land under his hand and seal is authorized by the county court to execute such a deed, the instrument is sealed if he affixes the seal of the county court and acknowledges it as his seal.⁵

By statute, a scroll may be a seal under certain circumstances. The statute provides that "every instrument in writing expressed on the face thereof to be sealed and to which the person executing the same shall affix a scroll by way of a seal shall be declared and adjudged to be sealed."⁶ If a writing purports on its face to be under seal but there is no scroll or common law seal affixed, it is not a sealed instrument.⁷ On the other hand, if a statutory scroll is affixed but there is no expression in the body of the instrument that the writing is under seal, it is not a sealed instrument.⁸ The scroll must be identified as a seal in the body of the instrument. A mere writing of the word *seal* within the scroll is not of itself sufficient.⁹ Even where the instrument is in the body thereof described as an *indenture*, that is not a sufficient identification of the scroll affixed below.¹⁰ When in a sheriff's deed the word *seal* is enclosed in a scroll or brackets and is referred to or adopted, that is a sufficient sealing.¹¹ The statutory scroll, however, does not operate as a seal on public records. Altho a public official is authorized to use his private seal in executing any public document or record in case no seal is provided, yet he cannot use a scroll as his private seal. He must use a common law seal which is an impression on wax or other tenacious substance.¹²

As to corporations, the early common law doctrine was that they could express their assent only by their common seal and that they

1. (1915) 177 S. W. 1070.

2. 4 Kent, Commentaries (11th ed.) p. 523.

3. *Allen v. Sullivan R. R. Co.* (1855) 32 N. H. 446.

4. *Pease v. Lawson* (1862) 33 Mo. 35; *Turner v. Field* (1869) 44 Mo. 382.

5. *Alt v. Stoker* (1894) 127 Mo. 466, 30 S. W. 132.

6. Revised Statutes 1835, p. 118, § 3.

7. *Grimsley v. Riley* (1837) 5 Mo. 280; *State ex rel. West v. Thompson* (1872) 49 Mo. 188.

8. *Boynton v. Reynolds* (1831) 3 Mo. 47.

9. *Glasscock v. Glasscock* (1844) 8 Mo. 577.

10. *Walker v. Kelle* (1843) 8 Mo. 218.

11. *Samuels v. Shelton* (1871) 48 Mo. 444; *Groner v. Smith* (1872) 49 Mo. 318.

12. *Gates v. State* (1850) 13 Mo. 11.

could only bind themselves by deed or special contract.¹³ The idea was that a corporation being an invisible body could manifest its intentions only by its common seal.¹⁴ Such a doctrine however is unworkable in modern life, so it has been greatly relaxed in Missouri both by statute and decisions. The Missouri statute provides that "parol contracts may be binding upon corporations if made by an agent duly authorized by a corporate vote or under the general regulations of the corporation."¹⁵ As to conveyances of land, it is provided that "it shall be lawful for any corporation to convey lands by deed sealed with the common seal of said corporation and signed by the president, vice-president or presiding member or trustee of said corporation."¹⁶ A corporation is also authorized to make and use a common seal and to alter the same at pleasure.¹⁷ This power, however, is permissive, not mandatory. So a corporation can make a binding parol contract. Even where the contract recites that it is sealed, the absence of the corporate seal will not be fatal to it.¹⁸ The assignment of notes to which the corporate seal is not attached is also valid.¹⁹ If a deed of conveyance is not signed in the name of the corporation but is signed by the president in his name as president of the corporation and if the corporate seal is affixed, it is the deed, not of the president, but of the corporation.²⁰ The corporate seal evidences that the deed is a corporate deed. The seal of the corporation is taken as the only proper evidence of its act in all cases where a seal would be required if the instrument were executed by an individual.²¹ But in most states and also in England, the common law doctrine that corporations can do no act or execute no writing unless the corporate seal is affixed is almost wholly repudiated.²² The tendency is to require the corporate act or writing to be sealed only when sealing would be essential to its validity if executed by an individual.²³

Another question in this connection is as to the appointment of an agent to execute a sealed instrument. The common law doctrine is that authority to execute an instrument necessarily under seal could only be conferred by a sealed instrument.²⁴ If the agent, however, unnecessarily attaches a seal to a sealed contract, parol authority of the agent will be sufficient as the contract will be allowed to operate

13. Angell and Ames, Corporations (9th ed.) § 228.

14. 1 Blackstone, Commentaries (Lewis's ed.) § 475.

15. Revised Statutes 1845, p. 232, Revised Statutes 1909, § 2993.

16. Revised Statutes 1845, p. 236, Revised Statutes 1909, § 3001.

17. Revised Statutes 1845, p. 231, Revised Statutes 1909, § 2990.

18. *Stevens v. Modern Maccabers* (1910) 153 Mo. 196, 132 S. W. 757.

19. *Buckley v. Briggs* (1860) 30 Mo. 452.

20. *Shewalter v. Pirner* (1874) 55 Mo. 218.

21. See *Sandford v. Tremlett* (1868) 42 Mo. 384.

22. Taylor, Landlord and Tenant (5th ed.) § 127.

23. See *Sandford v. Tremlett* (1868) 42 Mo. 384; *Sears, Corporations in Missouri*, § 212; Morawetz, Private Corporations (2d ed.) § 338.

24. 1 Mechem, Agency, § 212; *St. Louis Dairy Co. v. Sauer* (1894) 16 Mo. App. 1.

as a simple contract.²⁵ But when a corporation is a principal, a somewhat different doctrine prevails. The early common law doctrine that the appointment of a corporate agent must be under the corporate seal has been greatly relaxed. When the authorization of a corporate agent is not under seal and when the instrument by law is not required to be sealed, the agent can execute an instrument binding on the corporation,²⁶ even if the corporate seal is affixed.²⁷ His authority may be shown in other ways. The court, in absence of proof to the contrary, will presume from the fact that the corporate seal is affixed; that the agent did not exceed his authority in executing the instrument.²⁸ The presence of the corporate seal will raise the same presumption when the instrument is by law required to be sealed.²⁹ There is no Missouri case, however, deciding whether an agent can be authorized to execute a corporate sealed instrument by an instrument not under seal when his lack of authority is shown by the other parties to the suit. The chief purpose of the corporate seal is to manifest the corporate intent.³⁰ But a vote or resolution by the board of directors of a corporation as clearly manifests the corporate intent as does a corporate seal; so an agent authorized by such a vote or resolution should on principle be able to execute a deed or bond as binding as if his appointment were evidenced by a corporate seal.³¹

The law of sealed instruments has been greatly changed by statute. The statute provides that "the use of private seals in written contracts, conveyances of real estate and all other instruments of writing heretofore required by law to be sealed (except the seals of corporations) is hereby abolished, but the addition of a private seal to any such instrument shall not in any manner affect its force, validity, or character or in any way change the construction thereof." ³² This section makes unnecessary the use of a private seal on a private instrument. In *State v. Tobie* ³³ where the defendant was indicted for forging a deed, it was held that deed no longer imports a sealed instrument. In a covenant to release one of the joint tortfeasors, a seal no longer imports a satisfaction of the claim.³⁴ Furthermore,

25. *Schuetze v. Bailey* (1867) 40 Mo. 69.

26. *Southgate v. Atlantic & P. R. Co.* (1875) 61 Mo. 89; *Emmons v. Heceler Distilling Co.* (1881) 9 Mo. App. 578 memorandum.

27. *Sandford v. Tremlett* (1868) 42 Mo. 384.

28. *Musser v. Johnson* (1867) 42 Mo. 74; *Eppwright v. Nickerson* (1883) 78 Mo. 482; *Brownell & Wight Car Co. v. Barnhard* (1893) 116 Mo. 667, 22 S. W. 503.

29. *Foster v. Pacific Railroad Co.* (1877) 3 Mo. App. 566, memorandum; *Missouri Fire Clay Works v. Ellison* (1888) 30 Mo. App. 67.

30. 1 Blackstone, Commentaries (Lewis's ed.) § 475.

31. 1 Morawetz, Private Corporations (2d ed.) § 338; See *Bank of Columbia v. Patterson* (1813) 7 Cranch (U. S.) 299; *Mechanics Bank of Alexandria v. Bank of Columbia* (1827) 5 Wheaton (U. S.) 326; *Fleckner v. Bank of the United States* (1823) 8 Wheaton (U. S.) 338.

32. Revised Statutes 1909, § 2773. This section was first enacted Feb. 21, 1893.

33. (1897) 141 Mo. 547, 42 S. W. 1076.

34. *Judd v. Walker* (1911) 158 Mo. App. 156, 138 S. W. 655.

courts of equity will look behind the seal to see if there is any consideration, and will not enforce a sealed contract³⁵ or sealed release of judgment³⁶ unless there is an actual consideration. There appears to be no Missouri case deciding whether a court of law will also look behind the seal to see if there is any consideration.

The effect of the statute abolishing seals on gifts of chattels presents a question of some nicety. It is generally recognized that the gift of chattels may be effective when evidenced by a deed tho there is no delivery of the chattel.³⁷ This is sometimes said to rest on estoppel,³⁸ but in truth it is nothing more than the statement of the formality of the transfer of title. The seal does not in any sense take the place of consideration for consideration is not required. The seal is merely a formal substitute for delivery of the chattel itself. It would seem that the effect of the statute abolishing seals has been to abolish the strict requirement of the seal in an instrument which evidences a gift of the chattel. It can hardly be contended that it has been the effect of the statute to make gifts of chattels without delivery impossible. Just as land can be conveyed by an instrument which need no longer be sealed it would seem a gift of a chattel may now be evidenced by an instrument which is not under seal.

As the use of private seals (except the seals of corporations) in all instruments of writing heretofore required by law to be under seal has been abolished, it would seem that an agent can execute an instrument to which private seals are affixed, altho he has no authority under seal to do so. Even when a corporation having a seal conveys land, it seems that the officer or agent executing the sealed writing may be authorized other than by a sealed instrument. In *Donham v. Hahn*,³⁹ the director and secretary of a corporation executed a deed of trust on certain land held by the corporation. The secretary had no direct authority either by deed or by vote of the directors, but from the fact that he had on several other occasions executed the instruments without protest the court assumed that this was the approved custom of the corporation. When the acknowledgment of the deed of conveyance states that the corporate seal is attached and that the deed was signed by the proper officers, the acknowledgment does not have to state that the officers were authorized to execute the deed by the

35. *Bosley v. Bosley* (1900) 85 Mo. App. 424.

36. *Winter v. K. C. Cable Ry. Co.* (1900) 160 Mo. 159, 61 S. W. 606.

37. *McCutcheon's Admrs. v. McCutcheon* (1839) 9 Porter (Ala.) 650; *Horn v. Gartman* (1846) 1 Fla. 63; *Neuman v. James* (1847) 12 Ala. 29; *Gordon v. Wilson* (1856) 49 N. C. 84; *Green v. Goodall* (1860) 41 Tenn. 404; *Hogue v. Bterne* (1871) 4 W. Va. 658; *Walker v. Crews* (1882) 73 Ala. 412; *Tarbox v. Grant* (1898) 56 N. J. Eq. 199, 39 Atl. 378; *Rutz v. Dow* (1896) 113 Cal. 490, 45 Pac. 867.

38. *McWillie v. Van Vacter* (1858) 35 Miss. 428; *McCutcheon's Admrs. v. McCutcheon* (1839) 9 Porter (Ala.) 650; *Tarbox v. Grant* (1898) 56 N. J. Eq. 199; 2 Schouler, *Personal Property* (3d ed.) § 88; Thornton, *Gifts and Advancements*, § 190.

39. (1894) 127 Mo. 439, 30 S. W. 134.

board of directors. The deed is *prima facie* sufficient.⁴⁰ The general doctrine seems to be that an agent of a corporation may be appointed without the use of a seal, whatever may be the purpose of the agency.⁴¹ If a corporate seal is affixed to an instrument not required by law to be sealed, as for example an assignment of a claim by a corporation, the seal is *prima facie* evidence that the instrument was the act of the corporation.⁴² But if the corporate seal is not affixed to the assignment, the presumption carried with the seal that the officer had authority to execute the instrument does not arise and his authority must be gathered from other sources.⁴³ Hence this section in no way affects the construction of an instrument bearing a corporate seal.

It remains to be pointed out what corporate instruments must bear the corporate seal. If the instrument is required by law to bear the corporate seal, as in the conveyance of real estate⁴⁴ or if a statutory bond is required, such an instrument must still be sealed. But if the corporation has no corporate seal, its deed conveying real estate is binding notwithstanding that no corporate seal is affixed.⁴⁵ Further, if a corporation does have a corporate seal and if it gives an appeal bond, such a bond on the ratification of its imperfect execution becomes binding even tho the corporate seal is not attached.⁴⁶

In *State ex rel. Spellman v. Parke-Davis & Co.*⁴⁷ a question arose as to the validity of an attachment bond executed by an agent of defendant corporation. The corporation had a common seal but it was not affixed to the instrument. No attachment bond was required by statute, since the person against whom the attachment was levied was a non-resident.⁴⁸ Altho the corporate seal was not affixed, the bond was held to be binding. This decision is in accord with the principles above set forth with regard to corporate instruments and corporate agents. It illustrates how far the law has departed from the old common law requirement that all corporate instruments be sealed.

GARDNER SMITH.

40. *Strother v. Barrow* (1912) 246 Mo. 241, 151 S. W. 960.

41. 1 Morawetz, *Private Corporations* (2d ed.) § 338.

42. *Roth v. Continental Wire Co.* (1902) 94 Mo. App. 236, 68 S. W. 594.

43. *Degnan v. Thoroughman* (1901) 88 Mo. App. 62.

44. Revised Statutes 1909, § 3001.

45. *Pullis v. Pullis Bros. Iron Co.* (1900) 157 Mo. 565, 57 S. W. 1095.

46. *Campbell v. Pope* (1883) 96 Mo. 468, 10 S. W. 187.

47. (Mo., 1915) 177 S. W. 1070.

48. Revised Statutes 1909, § 2298.

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EXECUTORY LIMITATIONS OF PROPERTY IN MISSOURI

By MANLEY O. HUDSON
Professor of Law

NOTES ON RECENT MISSOURI CASES



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EXECUTORY LIMITATIONS OF PROPERTY IN MISSOURI

I INTRODUCTORY

Tho the Supreme Court of Missouri has been called upon to handle a great volume of litigation concerning the construction of deeds and wills during the past few years, many of the problems which continually arise in connection with the creation of future interests in property are still subject to confusion in Missouri law. The court has been very diligent in its efforts to effectuate the intentions of grantors and testators in such litigation, and has frequently gone very far toward effectuating real or supposed intentions not actually expressed.¹ But in an important minority of cases, expressed intentions have been thwarted as a result of the misapplication of some of the old rules of the common law restricting the creation of future interests. There has been too little consideration of the reasons behind these rules, and the court has not shown much disposition to avail itself of the modern development of them outside of court opinions. The result has been the establishment in Missouri law of some highly artificial rules which defeat the very intentions to which the courts have been enjoined to "have due regard."² For example, as the writer has pointed out in an earlier number of the Law Series,³ the rule against perpetuities was so applied in *Lockridge v. Mace*⁴ and *Shepperd v. Fisher*⁵ as to invalidate limitations which have frequently been upheld in other jurisdictions; and it has been sug-

1. See *Bean v. Kemmuir* (1885) 86 Mo. 666; *Cross v. Hoch* (1899) 149 Mo. 325; *State ex rel. Farley v. Welsh* (1913) 175 Mo. App. 303.

2. Since 1815, a statute has directed that all courts "concerned in the execution of any last will or testament, shall have due regard to the true intent and meaning of the testator." 1 Missouri Territorial Laws, p. 411, now Revised Statutes 1909, § 583.

3. 3 Law Series, Missouri Bulletin, p. 23.

4. (1891) 109 Mo. 162.

5. (1907) 206 Mo. 208.

gested in two Missouri decisions⁶ that the artificial rule of *Whitby v. Mitchell*,⁷ to the effect that any limitation to an unborn child following a limitation to its unborn parent is void, is a part of Missouri law.⁸

The greatest uncertainty prevails with reference to limitations which cut short estates previously created and limitations which are intended to have a future operation. The court continues to repeat some of the old feudal maxims of the early common law as if they still had life, and in some cases they have been invoked to defeat expressed intentions, the effectuation of which would violate no principle of public policy. It is common to read in the current reports, for instance, that "a fee cannot be limited on a fee"⁹ and that "a freehold cannot be created *in futuro*."¹⁰ In numerous cases the court has accepted the doctrine that any executory limitation after a fee simple is void if a general power of disposition is conferred on the taker of the fee simple. Yet there has been almost no exposition of the reasons for such a doctrine, and the numerous discussions of it elsewhere have apparently escaped the court's notice.¹¹ Many members of the bar must have shared the delight with which the writer greeted the opinion in *Gibson v. Gibson*¹² a few years ago and the attempt there made to restate the doctrine as applied in Missouri decisions—many must also have shared his disappointment that the actual decision in *Gibson v. Gibson* contributed so little toward resolving the doubts left by the previous cases.

This study will deal with the present position of executory limitations of real and personal property in Missouri law, which

6. *Lockridge v. Mace* (1891) 109 Mo. 162; *Shepperd v. Fisher* (1907) 206 Mo. 208. See also *Buxton v. Kroeger* (1908) 219 Mo. 224.

7. (1890) 44 Ch. Div. 85.

8. See the writer's fulmination against this suggestion in 3 Law Series, Missouri Bulletin, p. 29.

9. *Green v. Sutton* (1872) 50 Mo. 186; *Cornwell v. Orton* (1894) 126 Mo. 335; *Walton v. Drumtra* (1899) 152 Mo. 489.

10. See *O'Day v. Meadows* (1905) 194 Mo. 588, 621.

11. Professor Gray's very thoro analysis has become the classic treatment of this topic. Gray, *Restraints on Alienation* (2d ed.) § 74 *et seq.* But it has not been referred to in the numerous decisions of the Missouri court handed down since it was published.

12. (1911) 239 Mo. 490.

will involve a consideration of their validity at common law and under the English statutes of uses and wills and under the Missouri statutes, and an analysis of the Missouri decisions. The doctrine that any limitation after a fee simple to which is added an absolute power of disposal is void, will be examined particularly, and an effort will be made to point out a way of escape from it. The term executory limitation will be used with reference to the creation of executory interests¹³ in real and personal property by deed or by will; when contained in a will, such limitations will be called executory devises or bequests. The term executory interests in its broad sense should be contrasted with the term vested interests, and as such it includes contingent remainders; but it will be used in this study in the narrower technical sense which excludes all future interests capable of taking effect as remainders.¹⁴ It must be kept in mind that an executory interest may be either certain or contingent, but it can never be vested.¹⁵ It will be profitless to attempt a further definition without a review of the early common law and the effect of the statutes of uses and wills. The history of the subject makes it necessary to treat separately of real property and of personal property.

13. For an exhaustive classification of executory interests, see Smith, *Executory Interests*, § 75. (Smith's work is published as the second volume of *Fearne's treatise on contingent remainders*.)

14. "An executory devise is strictly such a limitation of a future estate or interest in lands or chattels, tho in the case of chattels personal it is more properly an executory bequest, as the law admits in the case of a will, tho contrary to the rules of limitation in conveyances at common law." *Fearne, Contingent Remainders*, p. 386. And Butler adds in a note, "Its being contrary to the rules of limitation in conveyances at common law, gives rise to two rules universally adopted in respect to executory devises; that wherever a future interest is so limited by devise as to fall within the rules laid down for the limitation of contingent remainders, or the estate limited by it is such as can take effect as a contingent remainder, it shall never take effect as an executory devise."

15. The similarity in nature between certain executory interests and vested remainders is frequently neglected. See Smith, *Executory Interests*, § 90. If A devises land to B from and after ten years after his death, B takes a springing executory interest tho the date is certain; the effect is the same as if A had devised to his heir for ten years, remainder to B. In the latter case B would be said to have a vested remainder, or more properly, he should be said to be seised subject to A's term. *Cf. Scott v. Scott* (1759) *Amb.* 383.

II VALIDITY OF EXECUTORY LIMITATIONS IN GENERAL

A. *Of Real Property*

1. *At Common Law.* While it is a familiar principle that the early common law did not allow a fee to be limited on a fee, the reason for it is frequently misstated. It was not because a feoffor or a grantor had nothing remaining in himself to give away after passing the biggest estate known to the law.¹⁶ The explanation is to be sought in the history of feudal tenure. The early common law was developed in a feudal society based on land tenure and its theories concerning the creation of future interests in land were determined by the exigencies of tenure.¹⁷ In the feudal mind the conception of seisin occupied the important place which in modern times we have given to the conception of title. The feudal lord insisted that at all times some one should be seised of his land, i. e., possessed of it under claim of such an interest as would render him responsible to the lord for the performance of the feudal dues.¹⁸ Such a tenant, i. e., one seised of a freehold, was the only person against whom a writ could be directed in a real action. This importance ascribed to seisin led to the establishment of the principles, first, that the seisin could not be put in abeyance, and second, that no transfer of a present freehold could be effected except by livery of seisin. The prohibition against placing the seisin in abeyance precluded the creation of future limitations unsupported by preceding estates—thus if A desired to convey to B from and after a future date, the conveyance could not be effected by a present livery of seisin for the seisin which would thereby pass to B would be in abeyance until the time for B's enjoyment, and no other method of conveying a freehold was known to the common law. Hence was established the principle that a freehold could not be created to com-

16. Such an explanation is given in *Green v. Sutton* (1872) 50 Mo. 186, where the court said that "when the fee—the whole estate—is disposed of nothing remains." See also *Reinders v. Koppelman* (1878) 68 Mo. 491; 2 Blackstone, Commentaries, 164.

17. The writer has expressed the opinion that tenure still exists in Missouri in 8 Law Series, Missouri Bulletin, p. 4. But it does not follow that the feudal rules must be applied.

18. Challis, Real Property (3d ed.) p. 100.

mence *in futuro*. Furthermore, successive limitations were void if they left the seisin in abeyance—if A enfeoffed B for life and attempted at the same time to convey to C and his heirs one year after B's death, the seisin would be in abeyance during that year and the limitation to C was void.¹⁹ It was for this reason that a remainder was required to fit immediately after the particular estate without any gap between them. But the inhibition against placing the seisin in abeyance did not prevent a shifting of the seisin from one person to another and it is difficult to find any logical explanation of the common law rule that the seisin could not be made to shift. If A enfeoffed B for life with a proviso that if B should go into the army the land should go to C and his heirs, C took nothing—he had no remainder because it was an ineffectual attempt to cut short B's life estate. So if A enfeoffed B and his heirs with a proviso that if B should go into the army the land should go to C and his heirs, C took nothing because the seisin had passed to B from whom it could not be made to shift by A's stipulation at the time of the feoffment. It was a consequence of the early law's aversion to a shifting of the seisin that a remainder could not lap over the particular estate and that a fee could not be limited on a fee. It was essential to a remainder that there should be neither gap nor lap.

But the exigencies of seisin did not forbid a feoffor's creating certain future interests in himself. If A enfeoffed B for life, B took the seisin for but a limited period after which it continued in A who had a *reversion*. If A enfeoffed B and his heirs so long as a certain tree should stand, it could not be said definitely whether A had kept any certain interest, for the tree might stand forever; so A's interest was denominated a *possibility of reverter*.²⁰ Such a possibility could not be created in C nor could it be assigned to C subsequently to its creation in A. It did not in any sense cut short B's estate, for A would not take until after the expiration of B's estate. But A might have provided

19. Cf. Gray, *Perpetuities* (3d ed.) § 918.

20. Possibilities of reverter may have been abolished by the statute of *Quia Emptores*. See Gray, *Perpetuities* (3d ed.) § 31. Their existence in Missouri today depends upon the existence of tenure and the force of *Quia Emptores*. See 8 Law Series, *Missouri Bulletin*, p. 10.

for B's estate to be cut short by annexing a condition subsequent, for breach of which a right of entry could be reserved to A; but such a right of entry could not be reserved or assigned to a stranger.²¹

At common law, therefore, the only future interests which could be created in another than the feoffor himself were remainders.²² After a time, contingent remainders were recognized;²³ but the common law allowed no other executory limitations.²⁴ A conditional limitation was legally impossible, but the liberal enforcement of trusts by courts of equity without regard to the restrictions prevailing at law paved the way for the introduction of new legal future interests by the statute of uses.

2. *Under the Statute of Uses.* Before the enactment of the statute of uses in 1536,²⁵ it was possible to provide for a shifting of the beneficial enjoyment of land and for the future existence of beneficial interests by means of uses. The person clothed with the legal estate held the seisin and was responsible for feudal dues, and courts of equity proceeded to act upon his conscience without regard to the artificial rules about abeyance of the seisin and conveyance by livery of seisin. The statute of uses gave legal sanction to the uses which equity had previously enforced, with the result of making possible future dispositions of the seisin which had previously been forbidden at law, tho it continued to

21. See *Kennett v. Plummer* (1859) 28 Mo. 142; 5 Law Series, Missouri Bulletin, p. 13.

22. *Cornelius v. Smith* (1874) 55 Mo. 528, 532. "As a matter of history it is a mistake to think that a remainder is so called because it is what remains after a 'particular estate' has been given away." "If after the expiration of one estate the land is not to come back to the donor, but is to stay out for the benefit of another, then it 'remains' to that other." 2 Pollock and Maitland, *History of English Law*, p. 22. Blackstone's oft repeated statement about remainders is not historically accurate and is misleading. 2 Blackstone, *Commentaries*, 164.

23. The recognition of contingent remainders probably dates from the fifteenth century. Williams, *Real Property* (17th Int. ed.) p. 411. See 8 Illinois Law Review 231.

24. It seems unnecessary to include curtesy and dower in this classification, tho strictly they are within it. Professor Gray includes them. Gray, *Perpetuities* (3d ed.) § 5 *et seq.* See also a discussion of future interests at common law in Fearn, *Contingent Remainders*, p. 381, note.

25. 27 Henry VIII, c. 10.

be impossible to put the seisin in abeyance. The use as it had been known in equity was a light and nimble thing and it kept this quality after the statute made it a legal interest. Hence after the statute, in any conveyance to uses effected by any of the common law methods, or in any agreement to stand seised to uses which could be effectuated either as a bargain and sale or as a covenant to stand seised, it was possible to create executory limitations without reference to the common law restrictions. The ordinary feoffment was not changed by the statute, i. e., the common law conveyances remained subject to the rules of the common law so far as the creation of future interests was concerned. But if such a conveyance were made to uses, or if by bargain and sale or covenant to stand seised a use were raised, then the use could be made to spring or shift freely.²⁶

After the statute, if A enfeoffed B and his heirs from and after a future date, B took nothing as before the statute. But if A agreed for a consideration to stand seised to the use of B and his heirs from and after a future date, B took a valid springing use in fee simple, and it was cognizable both at law and in equity. Or to accomplish the same result, A might enfeoff X and his heirs to the use of A and his heirs until the future date and thereafter to the use of B and his heirs. If A agreed to stand seised to his own use for life, and then to the use of B and his heirs, the statute executed the uses so that A thereafter had but a life estate.²⁷ Similarly, it has become possible to create a future estate which would have failed as a remainder at common law. A may agree to stand seised to the use of B for life and one year after B's death to the use of C and his heirs, for upon the termination of B's life estate, the use will result to A in fee and at the end of the year it will *spring* to C. Nor is

26. In *Pollard v. Union National Bank* (1877) 4 Mo. App. 408, 412, the court said that "It is almost a part of the definition of shifting and springing uses that they are contrary to the rules of the common law."

27. While the statute applies in terms only where one stands seised to another's use, in such cases "equity supplies a common law conveyance by holding the covenantor himself to be a trustee and to stand seised to the use." Gilbert, *Uses* (Sugden's ed.) 150-152, note, quoted in 1 Gray, *Cases on Property* (1st ed.) p. 505.

the common law prohibition against shifting any longer important. A may enfeoff X and his heirs to the use of B for life, but if B should go into the army then to the use of C and his heirs, and C will have a valid shifting use; or A may agree to stand seised to the use of B and his heirs but if B should enter the army then to C and his heirs. But as before the statute, if A enfeoffs B and his heirs and provides that on an event the estate shall pass to C and his heirs, C would have nothing.

The statute of uses thus made it possible to create a freehold *in futuro* and to limit a fee on a fee, and to create future interests which were incapable of taking effect as remainders. But the courts continued to approach every future limitation with a desire to effectuate it if possible as at common law before the statute of uses—hence the principle that what can be a remainder must be a remainder.

3. *Under the Statute of Wills.* The common law did not permit a devise of lands, but for some time prior to the statute of uses the devise of uses was permitted as a result of equity's forcing the feoffee to uses to hold to the uses named in the will of a feoffor or *cestui que use*. When the statute converted uses into legal interests, the chancery courts discontinued their enforcement of the devises of uses. But soon afterward, in 1540, the statute of wills authorized the devise of any socage lands "at the free will and pleasure" of the tenants.²⁸ It was for some time doubtful whether this statute permitted the creation of executory interests by devise, but the doubt was dispelled by the decision of the celebrated case of *Hinde v. Lyon*.²⁹ Historically, the sanction of executory devises may have antedated the recognition of executory interests limited in conveyances *inter vivos* under the statute of uses;³⁰ but the same liberality and freedom from common law restrictions were extended to both, and in view of the incompleteness of the statute of wills in this respect, this may have been

28. (1540) 32 Henry VIII, c. 1.

29. (1577) 3 Leonard 64.

30. Challis, *Real Property* (3d ed.) p. 170. Cf. *Cornellius v. Smith* (1874) 55 Mo. 528, in which it was said that "the courts have extended to these [family] settlements the same liberality of construction they have given to executory devises."

the result of an analogy drawn between executory interests created in wills and those made possible by the statute of uses. It would seem that no important distinction should be drawn between executory devises and executory limitations effected by deed and that any future interest which is valid as an executory devise should be valid as a springing or shifting use created by an *inter vivos* conveyance, and conversely.³¹

4. *Under Missouri Statutes.* The common law as it was adopted in Missouri in 1816³² must have been as it was modified by the statutes of uses and wills. Indeed, the English statute of uses itself was included in the body of law adopted by the Missouri statute,³³ for it cannot within the terms of the Missouri statute be said to have been "local to that kingdom"; the reenactment of the statute of uses in 1825³⁴ was therefore unnecessary and effected no important changes. The English statute of wills was not included because of the Missouri statute of wills,³⁵ but the latter must be construed to permit the creation of future interests under the same restrictions which obtained under the English statute of wills.

31. But in *Adams v. Savage* (1703) 2 Salk. 679 (also reported in Ld. Ray 854) and in *Rawley v. Holland* (1712) 22 Vin. Ab. 189, a use limited by deed to a person not *in esse* after an estate for years was held to be void. But these cases have been severely criticised by eminent writers. See an excellent article on "A point in the Law of Executory Limitations" by Challis, 1 Law Quarterly Review 412; Sugden, Powers (8th ed.) p. 35 *et seq.*; Sanders, Uses (Amer. ed.) 112. In 21 Law Quarterly Review 261, Professor Kales attributes the decision in *Adams v. Savage* to the fact that it was decided when it was not yet certain that the common law restrictions did not apply to springing executory interests created by deed.

32. 1 Missouri Territorial Laws, p. 436.

33. *Guest v. Farley* (1853) 19 Mo. 147.

34. Revised Statutes 1825, p. 215. The Missouri Statute copied verbatim the efficacious words of the English statute. In 1835 a condensed statute was enacted without any important change in effect. Revised Statutes 1835, p. 119. In 1845, the original wording was restored, but with the word "found" substituted for "from" in the expression "be found henceforth clearly deemed and adjudged". This is apparently a typographical error, and it was corrected in Laws of 1909, p. 901. The statute is now Revised Statutes 1909, § 2867.

35. A statute of 1807 authorized devises of lands. 1 Missouri Territorial Laws, p. 131, § 18. It was reenacted in 1815. *Ibid.*, p. 405, § 25. This statute follows the English statute of wills almost verbatim, in that it permits any tenant of land to devise "at his or her will or pleasure." No other terms of the statute can refer to the creation of future interests.

There has been very little legislation to affect executory interests since the adoption of the common law. In 1825, the rule in Shelley's case was abolished as to devises,³⁶ and in 1845 it was completely abolished as to both deeds and wills.³⁷ A statute of 1845 provided that "where a remainder....shall be limited to take effect on the death of any person without heirs, or heirs of his body or without issue," it should be construed as a definite failure of issue.³⁸ In 1845 the necessity of a contingent remainder's fitting immediately on the particular estate was relaxed as to posthumous children,³⁹ tho the Supreme Court has since held in *Aubuchon v. Bender*⁴⁰ that this statute "was but an affirmance of what had already become the law;"⁴¹ and in the statute to this effect there was appended, apparently as a rider, for it has no relevancy to what preceded,⁴² the provision that, "hereafter, an estate of freehold, or inheritance, may be

36. Revised Statutes 1825, p. 794. See 1 Law Series, Missouri Bulletin, p. 10, note 35.

37. Revised States 1845, c. 32, § 7. See *Tesson v. Newman* (1876) 62 Mo. 198.

38. Revised Statutes 1845, c. 32, § 6; now Revised Statutes 1909, § 2873. Unlike the English statute from which it was copied, 1 Victoria, c. 26, § 29, this Missouri statute makes no exception where a contrary intention is expressed.

39. Revised Statutes 1845, c. 32, § 9; now Revised Statutes 1909, § 2876. The Statute is fashioned on the English statute of 1699, 10 & 11 William III, c. 16.

40. (1869) 44 Mo. 560, 569.

41. The Missouri court relied upon the decision of the House of Lords in *Reeve v. Long* (1694) 3 Levinz 408, reversing the King's Bench decision in 1 Salk. 227. But it should have been noted that the remainder in *Reeve v. Long* was created in a devise. The English statute, tho due to the judges' dissatisfaction with the decision of the House of Lords in *Reeve v. Long*, did not mention remainders created in wills. In a note to Coke, Littleton, 298a, Butler says that "there is a tradition that as the case of *Reeve v. Long* arose upon a will, the Lords considered the law to be settled by their determination in that case; and were unwilling to make any express mention of limitations or devises made in wills, lest it should appear to call in question the authority or propriety of their determination." The Missouri statute mentions only *conveyances*; it was not enacted at the time of the execution of the deed in *Aubuchon v. Bender*, so that the decision in that case extends *Reeve v. Long* to *inter vivos* conveyances independently of statute.

42. This irrelevancy was pointed out in *O'Day v. Meadows* (1905) 194 Mo. 588, 621.

made to commence in future by deed, in like manner as by will."⁴³ It seems probable that the addition of this clause was due to a failure to appreciate the possibility of creating executory limitations in *inter vivos* conveyances by way of springing and shifting uses. Estates of freehold or inheritance were already susceptible of being created *in futuro* by any deed which operated as a bargain and sale or as a covenant to stand seised or as a common law conveyance to uses,⁴⁴ and in view of the fact that most if not all conveyances then operated either by way of bargain and sale or covenant to stand seised, there would seem to have been no need for this legislation. But as the writer has shown in a previous number of the Law Series,⁴⁵ it was in 1845 and is now possible to have a conveyance operate as a feoffment and the statute under consideration made possible the creation of such freeholds *in futuro* by such a conveyance or by a surrender or exchange without the employment of uses; and taken together with the statute of 1865 authorizing statutory grants,⁴⁶ it authorizes the creation of freeholds *in futuro* by statutory grant.⁴⁷ There can be no doubt about the possibility of creating springing future interests under this statute; but as to shifting interests the case is not so clear. The provision for a freehold to commence *in futuro* may not include shifting interests, i. e., it may have reference only to deeds which create estates which are limited to begin at a future time and not to deeds which create interests limited to cut short other estates created at the same time. But even if such a distinction were made in applying the statute, it would be of small consequence except for the doubt in the decisions as to the possibility of creating shifting interests by a conveyance to uses

43. Revised Statutes 1845, c. 32, § 9, now Revised Statutes 1909, § 2876.

44. *Allen v. DeGroodt* (1891) 105 Mo. 442.

45. 8 Law Series, Missouri Bulletin, p. 11.

46. Revised Statutes 1865, c. 109, § 1, now Revised Statutes 1909, § 2787.

47. See 8 Law Series, Missouri Bulletin, p. 21. It may be contended that the statute of 1865 authorizes the transfer but not the creation of future interests by statutory grant. This may be supported by the argument that the statute was not enacted to change the rules of limitation, but merely to afford a new method of conveyance. But *Cf. Abbott v. Holway* (1881) 72 Maine 304, cited in *O'Day v. Meadows* (1905) 194 Mo. 588, 623.

or a conveyance operating under the statute of uses. It can not be contended that the statute operated as a restriction on existing methods of creating future estates.

This statute concerning the creation of freeholds *in futuro* "by deed, in like manner as by will", was considered by the Supreme Court in *O'Day v. Meadows*,⁴⁸ in which the conveyance in question clearly operated as a bargain and sale because of the expressed consideration.⁴⁹ The court purported to hold that the statute applied, but it is clear that the mode of operation of the conveyance was misconceived, and that in view of its operating as a bargain and sale there was no necessity of relying on the statute. The case is therefore of little authority;⁵⁰ the court's statement that it was enacted "to change the common law rules applicable to conveyances," seems to have been made without any understanding of the change actually effected.

5. *Under Missouri Decisions.* The cases have not emphasized the distinction between executory interests created by will and those created by deed. But in view of the foregoing survey the distinction must be borne in mind during a study of the decisions.

The statement that a fee cannot be limited on a fee has frequently been repeated in the opinions, but the decisions have robbed it of its meaning. In *Faust v. Birner*⁵¹ there was a devise

48. (1905) 194 Mo. 588.

49. The conveyance in *O'Day v. Meadows* was expressed to be made in consideration of one dollar, which was sufficient to raise the use. On the requisites of a bargain and sale, see 8 Law Series, Missouri Bulletin, p. 19. *O'Day v. Meadows* was cited in *Buxton v. Kroeger* (1908) 219 Mo. 224, 256, for the proposition that it is not necessary "that there should be any estate created between the end of the life estate and the vesting of the estate in remainder." But it is clear that it stands for no such proposition.

50. In *Aldridge v. Aldridge* (1906) 202 Mo. 565, the court referred to this statute and said that "it is essential to the validity of a deed purporting to convey such an estate that the right to the future estate conveyed vest in the grantee immediately tho possession be deferred." But this must not be taken to mean that the future estate may not be contingent, tho there must be a certain right to the estate on the happening of the contingency. *Christ v. Kuehne* (1902) 172 Mo. 118.

51. (1860) 30 Mo. 414. At the death of the testator his widow was enfeoffed of a child which was never born alive. The remainder to that child may be neglected since a stillborn child will be taken never to have lived at all. *Marsellis v. Thalheimer* (1830) 2 Paige 35.

to the testator's widow for life with remainder in fee to her children by any husband whom she might later marry, but a proviso that if the wife died without issue the land should be divided between the testator's brothers. The testator's widow remarried and had three children and her husband was induced to pay a certain sum to the testator's brothers for an interest which they claimed to have under the will and which they purported to convey to him. The wife sued as administratrix of the second husband to recover the sum so paid. The trial court had instructed the jury that "by a plain and settled principle of law the defendants had no interest in the land in question under the will." In reversing and remanding the case, the Supreme Court said that it was a "good executory devise to the brothers."⁵² Tho it may be doubted whether this was an executory devise,⁵³ the decision is a clear recognition of the possibility of future interests created by executory devise.

In *Jecko v. Taussig*,⁵⁴ it was admitted that "a fee simple may be granted in such a way and upon such conditions that it may be defeated by the happening of some future event," and the court seems to have had in mind a conditional limitation after a fee simple. But some doubt was thrown on this by the statement in *Cornelius v. Smith*⁵⁵ that "under the old common law convey-

52. The court held that as an executory devise it was saved from remoteness by the statute making all failures of issue definite. Revised Statutes 1845, c. 32, § 67; now Revised Statutes 1909, § 2873. But this statute in terms applies only where *remainders* are so limited. See 3 Law Series, Missouri Bulletin, p. 10; *Naylor v. Godman* (1891) 109 Mo. 543; *Yocum v. Siler* (1900) 160 Mo. 281.

53. No attention was given by the court in *Faust v. Birner* to the principle that what can be a remainder must be a remainder instead of an executory devise. Smith, Executory Interests, p. 71. Applying this principle, it would seem that at the death of the testator his widow had a life estate, with a contingent remainder to her children to be born and an alternate contingent remainder to the testator's brothers. Whether this latter can become a good executory devise is a question of considerable nicety. A similar question arises in applying the Missouri statute concerning estates tail; it has been discussed in an article on "Estates Tail In Missouri" in 1 Law Series, Missouri Bulletin, p. 27.

54. (1869) 45 Mo. 167. It is not clear that a life estate with a power to convey the fee was not created in *Jecko v. Taussig*. *Vide post*, p. 38.

55. (1874) 55 Mo. 528.

ances an estate could not be limited to a stranger to the deed, except by way of remainder, and it may be that a legal title cannot be created in a stranger to a deed under the statute of uses." In the latter case, there was a bargain and sale to A and her heirs with a proviso that if B should pay certain sums and keep his father during life the land should go to B and his heirs, otherwise it should go to the heirs of B's father.⁵⁶ B failed to perform the conditions and the court treated A as trustee for the heirs of B's father, tho the executory limitation would seem to have been good as a shifting use executed by the statute and the heirs ought to have been held to have had the legal estate.

The validity of an executory devise seems to have been assumed in *Harbison v. Swan*,⁵⁷ but the point was not specially considered. In *Pollard v. Union National Bank*,⁵⁸ the St. Louis Court of Appeals gave very careful consideration to the creation of future interests after the statute of uses. There was a bargain and sale to A and his heirs in trust for B, and if C survived B then to C, otherwise the "property shall remain in [B and her heirs] subject to her absolute control and disposition." No question was raised as to the execution of the use in B and C,⁵⁹ but it was held that the executory limitation to C was good. It was contended that C took nothing because of the attempt to limit a fee upon a fee, but the court answered that such arguments, "so

56. B's father had caused the land to be conveyed by one who held subject to his use (tho it was not manifested in writing). On the right of B to share in the gift in default of his supporting his father, cf. *Holloway v. Holloway* (1800) 5 Ves. 399; *Welch v. Brimmer* (1897) 169 Mass. 204.

57. (1874) 58 Mo. 147. See the comment on *Harbison v. Swan* in 1 Law Series, Missouri Bulletin, p. 30.

58. (1877) 4 Mo. App. 408.

59. It is frequently overlooked that if A bargains and sells to B to the use of C, the statute of uses executes only B's use and not C's. *Guest v. Farley* (1853) 19 Mo. 147; *Roberts v. Moseley* (1873) 51 Mo. 282, 287; 2 Sanders, Uses, p. 52; *Matthews v. Ward* (1839) 10 Gill & J. (Md.) 443. See 8 Law Series, Missouri Bulletin, p. 20. A consideration of this point should not have changed the result in *Pollard v. Union National Bank*. But a use after a use will be executed by the statute; as where A bargains and sells to B for life, remainder to C and his heirs, both B's and C's uses are executed. This difference between a use after a use and a use on a use was overlooked by MARSHALL J., in his dissenting opinion in *Cornwell v. Wulff* (1898) 148 Mo. 542, 583.

far as they tend to show that the limitation is not in accordance with the common law rules relating to contingent remainders, are irrelevant, as it is not contended that the limitation would have been good independently of the doctrine of uses." This decision clearly upholds a shifting executory limitation created by deed.

The Supreme Court conceded in *Wead v. Gray*,⁶⁰ by way of *dictum*, "that by will, there may be a limitation of a future estate or interest in land or personal property which cannot consistently, within the rules of law, take effect as a remainder but may notwithstanding be upheld as an executory devise." Yet two years later, in *Bean v. Kenmuir*,⁶¹ the court seems to have been unanimous in admitting that in a deed of bargain and sale to A and her heirs and assigns with a limitation over to A's husband in the event of A's death, the limitation over would be void if the deed were construed to confer on A a fee simple instead of a life estate; and the decision that A took but a life estate seems to have been the result of this misconception.

The possibility of a limitation after a fee by way of executory devise was clearly admitted in *Chew v. Keller*⁶² tho it was held that no future estate had been created. A clearly valid executory devise limited on an event which did not happen was called a remainder in *Prosser v. Hardesty*,⁶³ and the court seems to have been willing to uphold it as such; the point received but

60. (1883) 78 Mo. 59. Also reported in (1880) 8 Mo. App. 515.

61. (1885) 86 Mo. 666. It is to be noted that the opinion of the court, in which three judges concurred, was written by one of two dissenting judges; but there seems to have been no dissent on the proposition stated in the text, for the dissenting judges concluded that the limitation over was "inoperative and void." No power of disposition was found in the word "assigns"; but *cf. Gannon v. Pauk* (1906) 200 Mo. 75, 88.

62. (1889) 100 Mo. 362. In *Cornwell v. Wulff* (1898) 148 Mo. 542, 549, GANTT, C. J., compared *Chew v. Keller* with *Pells v. Brown* (1620) Cro. Jac. 590. See also *Gaven v. Allen* (1889) 100 Mo. 293, in which the court seems to have recognized the validity of an executory devise which would divest an estate given to the testator's widow on her remarriage; the widow was said to have a "base or qualified fee."

63. (1890) 101 Mo. 593.

scant consideration, however. In *Naylor v. Godman*,⁶⁴ there was a devise to A for life with remainder in fee to his children and a limitation over in the event of his death without issue. A died without issue and it was not shown that he had ever had issue. The court said that the limitation over was good as an executory devise, but it seems quite clear that it took effect as a remainder.⁶⁵

It is difficult to determine from the opinions in the famous *Cornwell* cases⁶⁶ what the attitude of the Supreme Court was at that time on the possibility of executory limitations in a deed. In *Cornwell v. Orton*, GANTT, J., who wrote the court's opinion, seems to have thought that because no remainder can be created after a fee simple, any limitation upon a fee was void. But four years later, when the same learned judge wrote the majority opinion in *Cornwell v. Wulff* he seems to have made a more careful investigation and was ready to recognize the possibility of an executory limitation by way of springing or shifting use or executory devise. In the later opinion he referred to *Pells v. Brown*,⁶⁷ which is the most famous case on executory devises, and said erroneously that *Chew v. Keller* was "just such a case." But the dissenting judges⁶⁸ in *Cornwell v. Wulff* seem to have failed to recognize the possibility of an executory limitation after a fee simple even in the absence of a power of disposal.

In *Walton v. Drumtra*,⁶⁹ the majority of the court held that the deed created a valid equitable remainder after an equitable

64. (1891) 109 Mo. 543. Tho the testator died in Kentucky, it is not shown that he was domiciled there at the time of his death, so that the provision of the will was construed according to Missouri law. The land in question was purchased by the executor under the directions of the will and it passed as tho it had been devised in the will.

65. If children had been born to A, they would have had a vested remainder and the limitation over must, during their lives, have been an executory devise, if it was valid at all. This involves the question discussed *supra*, in note 53.

66. *Cornwell v. Orton* (1894) 126 Mo. 355; *Cornwell v. Wulff* (1898) 148 Mo. 542.

67. (1620) Cro. Jac. 590.

68. MARSHALL, SHERWOOD, and BRACE, JJ. MARSHALL, J., who wrote the opinion, said that "logically one who has given all he has to another has nothing more to give to a third party. This was the reason underlying the old doctrine that a fee cannot be limited on a fee."

69. (1899) 152 Mo. 489.

life estate, but by what was apparently a slip, it was called an executory limitation.⁷⁰ In his concurring opinion, MARSHALL, J., said that all of the judges agreed that "a fee can not be limited upon a fee," which would seem to have amounted to a denial of the possibility of an executory limitation after a fee simple. The possibility of an executory devise after a definite failure of issue was clearly recognized in *Yocum v. Siler*,⁷¹ tho the event upon which it was to take effect had not happened. In *Hoselton v. Hoselton*,⁷² a testator devised lands to his son as long as the son should pay the taxes on them or cause them to be paid, and "in the case of the failure to pay taxes, the land to go to his four children" named. The named children sought to recover the land from their father's second wife who claimed a homestead. The testator's son failing to pay taxes, they were paid by his second wife. The counsel did not contend that the first devisee took but a life estate, but admitted that he took a fee and contended that the limitation was void. The court admitted the validity of the limitation over, calling it a conditional limitation,⁷³ but held that the condition had not happened.

After the decision of the cases referred to, one would have thought it clear that an executory devise is good in Missouri. The

70. It could not have been an executory limitation cutting short the legal estate in the trustee, for the court expressly recognized that the trustee had a duty to convey the legal title to the holder of the future interest—the latter must therefore have had an equitable interest. The trust was active and not executed by the statute of uses.

71. (1900) 160 Mo. 281. See also *Yocum v. Parker* (1904) 134 Fed. 265. MARSHALL, J., dissenting in *Yocum v. Siler*, seems to have thought that no executory devise could be made after a fee simple.

72. (1901) 166 Mo. 182.

73. *Dumey v. Schoeffler* (1857) 24 Mo. 170, also recognizes such a conditional limitation as valid. Cf. *Farrar v. Christy* (1857) 24 Mo. 453. On the distinction between conditions subsequent and conditional limitations see 5 Law Series, Missouri Bulletin, p. 8. The term conditional limitation when used by the Missouri courts has usually meant either a shifting use or a shifting executory devise. A conditional limitation should be sharply distinguished from a special limitation. If A conveys to B and his heirs so long as the University of Missouri is located at Columbia, B holds subject to a special limitation and his interest is properly called a determinable fee. If A conveys to B and his heirs provided that if the University of Missouri is moved from Columbia, then to C and his heirs, B holds subject to a conditional limitation and C takes a shifting use. Strictly speaking, B does not get a determinable fee in the latter case, tho it is often called such.

dicta in *Simmons v. Cabanne*⁷⁴ are therefore nothing short of startling.⁷⁵ After a devise to trustees for his children, a testator had made a limitation over to his brothers in the event of his children's death under twenty-one without issue. The court said that if the will were construed to confer on the testator's children life estates, with fee simple remainders in the grandchildren, "then the attempt to pass the fee to the brothers of the testator upon all his sons' dying without issue within the age of twenty-one years, would be limiting a fee upon a fee, or rather, and worse still, would amount to limiting the entire fee to two different persons or sets of persons at the same time"; and that if the testator's sons had been given an equitable fee simple, "then the attempt to limit the fee to the testator's brothers would be void for repugnancy." These *dicta* are the pronouncements of the court *en banc*, thru the same judge who had expressed similar misconceptions in *Cornwell v. Wulff* and *Yocum v. Silcr*.

The validity of an executory devise was admitted in *Gannon v. Pauk*,⁷⁶ tho the event upon which it was to vest did not happen. So, too, in *Gannon v. Albright*,⁷⁷ where the court was clearly of the opinion that the statute making failures of issue definite⁷⁸ applies as well where executory devises as where remainders are

On the use of these terms by various writers, see Gray, *Restraints on Alienation* (2d ed.) § 22, note; Smith, *Executory Limitations*, § 148. Whether there may be an executory limitation after a determinable fee, presents a question of great nicety. Mr. Challis answers it in the affirmative. Challis, *Real Property* (3d ed.) p. 173. To the same effect is Smith, *Executory Interests*, § 126, but Smith is careful to speak of it as a springing interest. *Ibid*, § 165. See the valuable discussion of the topic in Tiffany, *Real Property*, § 125, note. The will in *Hoselton v. Hoselton* really created on this theory, a determinable fee simple, i. e., a fee subject to a special limitation, and the gift over operated as a springing executory limitation. Some writers, notably Gray, do not recognize the possibility of a determinable fee since the statute of *Quia Emptores* was enacted in 1290. Gray, *Perpetuities* (3d ed.) § 32. See Kales, *Future Interests in Illinois*, § 125. To them, therefore, the limitation over in *Hoselton v. Hoselton* would have been a conditional limitation.

74. (1903) 177 Mo. 336, 352.

75. Professor Gray speaks of them as "remarkable" in his classic book. Gray, *Perpetuities* (3d ed.) § 68a, note.

76. (1904) 183 Mo. 265, 273, (1905) 200 Mo. 75.

77. (1904) 183 Mo. 238.

78. Revised Statutes 1845, c. 32, § 6; now Revised Statutes 1909, § 2873.

limited.⁷⁹ *Kessner v. Phillips*⁸⁰ involved the validity of certain restraints on alienation, and in speaking of spendthrift trusts, the court said that "such limitations or conditions cannot be grafted upon a fee simple, because they are repugnant to the absolute ownership incident to the fee." But the true reason would seem to be founded in the public policy which demands free alienability.

It is submitted that it was largely due to a misconception of executory devises that a monstrous result was reached in *Shepperd v. Fisher*.⁸¹ There was a devise to trustees for the testator's daughter Mary for life and "at her death to her bodily heirs, if the said bodily heirs have issue, forever, but should the said bodily heirs of the said Mary die without issue, then this estate is to revert to this grantee [devisor], his heirs, assigns, or legal representatives." It would seem clear that Mary took a life estate, with a remainder in fee to her bodily heirs subject to an executory devise to the heirs of the testator in the event of Mary's bodily heirs' dying without issue; the executory devise being void for remoteness, it failed altogether and its failure should have left the bodily heirs' remainder in fee undivested.⁸² But the court held that the bodily heirs took but a life estate,⁸³ "liable to be enlarged into a fee by the birth unto them of the 'issue' referred to in the will."⁸⁴ The court neglected the fact that issue born to the

79. See also *Naylor v. Godman* (1891) 109 Mo. 543; and *Yocum v. Siler* (1900) 160 Mo. 281. An executory devise was held valid in *McCune v. Goodwillie* (1907) 204 Mo. 306, and in *O'Day v. O'Day* (1905) 193 Mo. 62.

80. (1905) 189 Mo. 515.

81. (1907) 206 Mo. 208. The writer has pointed out the misapplication of the rule against perpetuities made in *Shepperd v. Fisher*, in 3 Law Series, Missouri Bulletin, p. 14.

82. "If there be no executory devise to take effect on the happening of the condition on which the fee was to determine, or no one to take it, the fee is not cut down but remains, unless there is something else in the will to show that the intention of the testator was that the fee should determine absolutely on the happening of the condition with reference to the devise over." VALIANT J., in *Sullivan v. Garesche* (1910) 229 Mo. 496. See also *Yocum v. Siler* (1900) 160 Mo. 281, 239.

83. For this the court cited a dissenting opinion in *Yocum v. Siler* (1900) 160 Mo. 281, 313, 314, 315; it is submitted that the majority opinion in *Yocum v. Siler* is authority to the contrary.

84. It is true that the common law recognized the enlargement of estates on condition. Coke, Littleton, 217b; Lord Stafford's Case, 8 Coke Rep. 74; Fearn, Contingent Remainders, p. 279; Smith, Executory Interests, § 137. More recent writers such as Leake, Challis,

bodily heirs might have predeceased them, and it seems to have failed to apply the well established rule favoring vested rather than contingent interests.⁸⁵

Whatever doubt may have existed as to the validity of executory devises after *Simmons v. Cabanne*, ought to have been dispelled by the opinion in *Sullivan v. Garesche*.⁸⁶ There was a devise to the testatrix's daughters, Kate and Julia with a proviso that "in event of the death of both before marriage, said property shall be divided equally among my surviving children." It was held that the claimant was not the heir of a "surviving" child and therefore had no interest in the land as such; further, that he had no reversionary interest as heir of the testatrix since Kate and Julia took a fee simple which could be divested on the event named only in favor of surviving children who had a contingent executory devise. In other words the court held that Kate and Julia took a fee simple subject to a contingent executory devise, the contingency being the double one of their deaths unmarried and of the survival of at least one of the executory devisees, and that their fee simple would not be divested unless both parts of the contingency happened, and on the facts in *Sullivan v. Garesche* this had not occurred. While it would be consistent with the result of this decision to say that the executory devise was void, the opinion unequivocally stamps it as valid and it is so clear that the matter ought at last to be free from doubt. And this seems to have been the opinion of the court itself in *Brown v. Tuschoff*⁸⁷ and in *Buckner v. Buckner*.⁸⁸

Washburn and Gray, seem to have given no attention to the point. The enlargement as described by Coke, seems to have been no more than a merger of a particular estate in a future estate created by release which operated as an executory grant. The merger did not occur until the condition happened. In *Shepperd v. Fisher*, it was unnecessary to resort to such circumvention for the fee simple of the bodily heirs should have been held to be vested subject to being divested, since the law favors vested estates. *Edwards v. Hammond* (1683) 3 Levinz 132.

85. *Chew v. Keller* (1889) 100 Mo. 362.

86. (1910) 229 Mo. 496.

87. (1911) 235 Mo. 449.

88. (1913) 255 Mo. 371.

We may safely say, therefore, that in spite of the *dictum* in *Simmons v. Cabanne*, an executory limitation, either springing or shifting, is now valid in Missouri when created in a will.⁸⁹

It would seem that there should be no doubt as to the possibility of creating a springing executory interest by deed operating as a bargain and sale or as a covenant to stand seised, or, since the statute permitting an estate of freehold to be made to commence *in futuro* by deed as by will, by any conveyance which would have been good at common law apart from uses or which would now be good as a statutory grant. Since the decision of *O'Day v. Meadows*,⁹⁰ the Supreme Court will probably be very liberal in allowing future springing interests.

A conveyance to take effect at the death of the grantor seems to be subject to exceptional scrutiny, however. No one will contend that a deed can be made to accomplish the effect of a will. The chief distinction between a will and a deed is that the former remains ambulatory until the maker's death and may be changed as he pleases. If it is clear that an instrument is not intended to be ambulatory but binding from the time of execution, it is not testamentary and it should be upheld as a deed wherever possible. But in *Murphy v. Gabbert*⁹¹ the test was stated to be whether the instrument "is to take effect *in presenti* or after the death of the maker." This test is misleading in that it may be applied to exclude the creation of a present right to a future interest. If A conveys to B from and after the next presidential election, the conveyance operates presently to give B a present right to a

89. It is to be noted that where there is a devise to a class, the members of which are subject to future determination it will frequently be necessary to support the gift as a shifting executory devise. If for instance, the devise is to A for life, with remainder to B's children to be born before or after A's death, the first child born during A's life will take a vested remainder at the time of its birth, and this vested remainder will open up to let in after-born children, some of whom tho incapable of taking by way of remainder may take by executory devise. This was plainly recognized in *Buckner v. Buckner* (1913) 255 Mo. 371. See also *Thomas v. Thomas* (1899) 149 Mo. 426; *Gates v. Seibert* (1900) 157 Mo. 254.

90. (1905) 194 Mo. 588. A valid springing interest seems to have been created in *Allen v. De Groodt* (1891) 105 Mo. 442.

91. (1901) 166 Mo. 596. A will was very clearly intended in *Miller v. Holt* (1878) 68 Mo. 584.

future estate quite as clearly as if A conveyed to C for life and then to B. In the latter case B has a vested remainder, which is a present right to a future estate; whereas in the former case, B has a springing executory interest, which is a present right to a future interest. Both are *to take effect in the future* in the sense that B is not to have the possession until a future time. The instrument in question in *Murphy v. Gabbert* stated that "the intention of this instrument of writing is such that Mrs. Ann Ellison [the maker] relinquishes her entire right at her death, then this deed is to immediately come into effect, but not until then." It was a queer process of reasoning which led the court to hold that "no interest was presently conveyed thereby which interfered with the life estate of the grantor, and if any effect whatever is to be given to the words of reservation they limited the fee to take effect on the death of the grantor and not before, that is, they limited the estate to take effect *in futuro*, which at common law can be done only when an estate is granted." The instrument seems to have been held a will because it was inoperative as a deed. But it is submitted that it was a good bargain and sale of a springing interest and that the decision was due to a neglect of the statute of uses as well as of the statute as to freeholds *in futuro*.⁹²

But in *Christ v. Kuehne*,⁹³ decided one year later, the court seems to have corrected the error, for tho *Murphy v. Gabbert* was not cited and the instrument contained a more equivocal phraseology, it seems impossible to reconcile the decision in *Christ v. Kuehne* with the test applied in *Murphy v. Gabbert*. It is difficult to see just what was the ground upon which the court decided *Christ v. Kuehne*; the maker of the instrument conveyed from and after his death to his wife for her life and after her death to his own heirs at law. It seems clear that the title remained in the grantor subject to a springing executory limitation

92. *Murphy v. Gabbert* was said to have been rightly decided in *O'Day v. Meadows* (1905) 194 Mo. 588, 620. And the decision in *Aldridge v. Aldridge* (1906) 202 Mo. 565, seems to support it.

93. (1902) 172 Mo. 118. *Murphy v. Gabbert* and *Christ v. Kuehne* were decided by different divisions of the Supreme Court, composed of different judges.

to his wife for life and a springing executory limitation⁹⁴ to his heirs after her death,⁹⁵ which latter would become a remainder when the estate vested in the wife. But the court spoke of the interest of the grantor's heirs as a remainder even during the life of the grantor—this cannot be technically exact unless the conveyance be given the effect of creating a life estate in the grantor, followed by a remainder for life in his wife and a remainder in his heirs. This was recognized in *Dozier v. Toolson*⁹⁶ where it seems to have been held that the deed had the effect of creating a life estate in the grantor and a vested remainder in the grantee. The court went upon the ground that a life estate was reserved by the grantor. It recognized the distinction between an exception and a reservation⁹⁷ and said in effect that the life estate was a new right issuing out of the thing granted. It is obvious that if this had been possible at common law the effect of a freehold *in futuro* would have been possible, but in a strict sense no life estate could be reserved at common law because an actual change of possession by means of livery of seisin was required for the creation of any new estate.⁹⁸ Whether the Missouri statute authorizing conveyancing without livery of seisin has changed this rule of the common law would seem to be doubtful. A more proper method of reaching the result of *Dozier v. Toolson* would be this: since the deed operated by way of bargain and sale, the grantor may have agreed to stand seised to his own use for life and then to the use of the grantee in fee; the

94. If A conveys to B and his heirs with a provision that on an event the estate is to shift to C for life and after C's death to D and his heirs both C and D have executory interests and D cannot properly be said to have a remainder until after the happening of the event, at which time his executory interest becomes a remainder.

95. There is no sound objection to the creation of a springing or shifting interest in persons not *in esse*. See Gray, *Perpetuities* (3d ed.) § 61 *et seq.* But the point is by no means clear on the authorities. *Christ v. Kuehne* is authority for allowing a springing executory limitation to persons not *in esse*. Cf. *Thomas v. Wyatt* (1860) 31 Mo. 188.

96. (1904) 180 Mo. 546.

97. As made in *Snoddy v. Bolen* (1894) 122 Mo. 486. In other states it has been said that the grantor may reserve a life estate, but as pointed out in *Tiffany, Real Property*, § 134, this is technically inexact.

98. *Kales, Future Interests*, § 158a. Rents are properly said to be reserved.

statute would execute the use, tho this seems illogical⁹⁹ and the result of the application of the statute would be that the grantor would be seised of the life estate with the remainder in fee to the grantee. It would seem, however, that there should be an expressed intention on the part of the grantor to stand seised to his own use for life. If by force of the bargain and sale the legal title were to pass immediately to the grantee, the grantee might hold in trust for the grantor, but in this event there could be no legal life estate in the grantor for the statute, having executed a use in the grantee, would be exhausted. Nor is it possible to support a legal life estate in the grantor on any theory of resulting use, for if the use results it results in fee.

The better explanation would seem to be that by force of the deed of bargain and sale a future springing use is created in the grantee. The grantor remains seised of the fee simple, which upon his death will immediately spring to the grantee. This is not objectionable as a testamentary disposition, for it would take effect at the time of the execution of the deed in the sense that the grantee would become entitled to an executory interest which would operate in the future by a springing of the use. This explanation is the view adopted in *Vinson v. Vinson*¹⁰⁰ where it is expressed with exceeding clearness.

It is important which of these views is adopted in at least one class of cases. If the grantor were to marry after executing the deed, his wife would not be entitled to dower if he was seised of only a life estate; but if the grantor be conceived to be seised of the fee subject to the springing use, then his wife will have dower.¹⁰¹ It would have made no difference in the result of *Dozier v. Toolson*, however, for the grantee's husband was not entitled to curtesy whether the grantee had a vested

99. *Vide ante*, note 27; Gilbert, *Uses* (Sugden's ed.) 150, 152. But see Gray, *Perpetuities* (3d ed.) § 930, note.

100. (1879) 4 Ill. App. 138. See also *Shackelton v. Sebre* (1877) 86 Ill. 616.

101. *Buckworth v. Thirkell* (1785) 1 Coll. Juris. 322; *Moody v. King* (1825) 2 Bing. 447; Kales, *Future Interests*, § 158b; Tiffany, *Real Property*, § 183; 2 Jarman, *Wills* (6th ed.) p. 1453.

remainder or an executory springing interest, in view of the fact that the grantor did not die until after the death of the grantee.¹⁰²

102. *Of. Martin v. Trail* (1897) 142 Mo. 85.

The flood of litigation since *Murphy v. Gabbert* seems to indicate that the bar was taken unawares by that decision. It had been preceded by but one case, *Miller v. Holt* (1878) 68 Mo. 584, in which the instrument purporting to be a will was never actually delivered, and was of course held to be testamentary; but much litigation followed swiftly upon the heels of *Murphy v. Gabbert*. In *Griffin v. McIntosh* (1903) 176 Mo. 392, the instrument, tho called a deed, contained a provision that the grantor should hold it in his possession until his death and the court relied upon the fact that it was so kept and held that there had been no delivery. In *Aldridge v. Aldridge* (1902) 202 Mo. 565, a grantor purported to convey to his wife for life, remainder to his son. The deed contained the condition however, that if the grantor should outlive his wife the land should revert to him in fee and if he should predecease his wife, then she should hold for life, remainder to the son in fee. The court held that it was the intention to make a testamentary disposition and that the instrument had no effect as a deed. In *Givens v. Ott* (1909) 222 Mo. 395, the instrument provided that it should not "take effect until the death of the grantor". The court gave little consideration to the point but held that the deed was invalid as such, but there were many other grounds for the decision. In *Terry v. Glover* (1911) 235 Mo. 544, the court held that there was no delivery of the instrument, and it was entirely *obiter* that it was said to be testamentary in nature because of the clause providing "this deed not to go into effect until after the death of" the grantor. In *Sims v. Brown* (1913) 252 Mo. 58 the instrument was in form a will, and it was contended that it operated as a deed as of the time of its execution, but it is very clear from the form of the instrument and from the power reserved by the person who executed it over parts of his property that it was intended to be testamentary in its nature. In *Priest v. McFarland* (1914) 262 Mo. 229, the words of the instrument do not appear in the report. The court states that it "expressly reserves a life estate in the grantor and conveys at the same time, by words of present import, a vested remainder in the property to the grantees." It recited that the instrument should become absolute and fully convey the title after the death of the grantor. The court held that it operated as a deed at the time of its execution and the decision with reference to the future interest seems to sustain the result of *Dozier v. Tolson*. In *Goodale v. Evans* (1914) 263 Mo. 219, the instrument was in all respects an ordinary deed of bargain and sale, but it contained the provision that the grantee was "to have and to hold the premises for and after the death of" the grantor. It also contained the statement that "it is the intention of the grantor by this deed to convey said property to said [grantee] for life to take effect on the death of the grantor." It is very clear that the grantor intended to be bound by the deed as and from the time of its execution for it was duly acknowledged and recorded. But the court felt "required by the authorities to hold the deed void because it is testamentary in character and not executed according to the statutes of wills." It seems impossible to defend this decision but the reversal and remanding of

In *O'Day v. Meadows*,¹⁰³ the court relied on the statute as to future freeholds in upholding a springing interest created by deed, and it seems that apart from the statute it would have declared it void. *Christ v. Kuehne* was not cited. It has been pointed out in this study that the result of *O'Day v. Meadows* need not be rested on the statute, and if the foregoing analysis of *Christ v. Kuehne* be sound, that case ought to have been controlling authority.

Since the decision in *O'Day v. Meadows* there would seem to be no doubt as to the validity of a springing interest created by deed both under and independently of the statute, and it is to be hoped that the court will not continue to repeat the obsolete maxim that a freehold cannot be limited *in futuro*.¹⁰⁴

But it were still somewhat of a venture to say that shifting interests can be created by deed in Missouri for we may yet be confronted with a decision that a fee limited upon a fee is void, in spite of the statute as to freeholds *in futuro*, tho by a convey-

the case may be put upon the ground of incompetency of one of the witnesses. *Wimpy v. Ledford* (1915) 177 S. W. 302 was decided by the other division of the court five months after the opinion in *Goodale v. Evans* was handed down. The instrument professed to be made with the understanding that the grantor should have the property during his lifetime and that at his death "then the title is to pass" to the grantee. This would seem to be a more emphatic postponement of the time of the instrument's binding the grantor than the words in *Goodale v. Evans*, but the court held it to be a good deed without citing *Goodale v. Evans* and chiefly, it seems, on the authority of *Dozier v. Tolson* and *Christ v. Kuehne*. *Wimpy v. Ledford* offers a ray of hope for the narrowing of *Murphy v. Gabbert* and *Goodale v. Evans*. It is submitted that if possible every instrument ought to be so construed as to be capable of having some effect, *Hunt v. Hunt* (1904) 119 Ky. 39, and that in view of this principle there can be no possible justification of the strict rule of *Goodale v. Evans* and its defeat of clearly expressed intentions.

103. (1905) 194 Mo. 588. In *Anglade v. St. Avil* (1878) 67 Mo. 434, it was said that an ante-nuptial contract operated as a conveyance as of the time of the marriage, but the contract seems to have been made on the same day on which the marriage was celebrated so that the case is no authority for a conveyance *in futuro*.

104. The court in *Aldridge v. Aldridge* (1906) 202 Mo. 565, said of creating a future freehold, "if that be conceded." It is submitted that it ought to have been conceded without argument. See *Sims v. Brown* (1913) 252 Mo. 58.

ance which may operate as a bargain and sale.¹⁰⁵ The history of the subject in other states, notably in Illinois,¹⁰⁶ is not encouraging.

B. *Of Chattels Real and Personal*

6. *Under the Common Law.* It is a more difficult task to trace the origin and history of future interests in personal property. The feudal restrictions resulting from the rules concerning seisin did not apply to chattels, for from a very early time chattels have been owned absolutely and not *held*. Strictly, it is improper to speak of estates in chattels, therefore, and there would seem to be no reason why future interests in chattels should not be freely created and transferred.¹⁰⁷ Certain distinctions have grown up which make necessary the separate treatment of chattels real and chattels personal.

Chattels Real. A lease for ninety-nine years puts into the lessee an estate of less than freehold which is conveniently called a term and classed as a chattel real. A term could be assigned very informally at common law and smaller terms could be created out of it by sub-leases; but no life estate could be carved out of it for the very technical if not absurd reason that in the eyes of the law a life estate is greater than any term.¹⁰⁸ A future term

105. In *Pendleton v. Bell* (1862) 32 Mo. 100, by a marriage settlement, executed before the marriage, land was conveyed to trustees to the use of the husband and his heirs until the marriage and then to the use of the wife for life, etc. No question was raised as to the validity of the shifting interest.

106. The Illinois Supreme Court held a shifting executory interest created by deed void, in *Palmer v. Cook* (1896) 159 Ill. 300; and a similar result was reached as to executory devises in *Ewing v. Barnes* (1895) 156 Ill. 61, and *Silva v. Hopkinson* (1895) 158 Ill. 386. But the latter two cases seem to have been overruled in *Glover v. Condell* (1896) 163 Ill. 566. See the discussion of these cases by Prof. Louis M. Greeley in 14 *Harvard Law Review* 595, which is answered in *Kales, Future Interests in Illinois*, § 163 *et seq.* *Palmer v. Cook* seems to have been recently overruled in *Stoller v. Doyle* (1913) 257 Ill. 369, which recognizes the possibility of limiting a fee on a fee by deed. See 8 *Illinois Law Review* 495.

107. 4 *Law Series, Missouri Bulletin*, p. 39; *Gray, Perpetuities* (3d ed.) § 802 *et seq.*

108. Thus any estate for years will merge in a life estate.

could be created¹⁰⁹ and an existing term could be assigned *in futuro*, there being no danger of putting the seisin in abeyance and no necessity of livery of seisin. But the termor could not assign to another from and after the death of the assignor, for this would be in effect carving a life estate out of the term and such an attempted assignment is void.¹¹⁰ A having a term may assign it to C from and after B's death, however, for there is no presumption that B will not die during the term. But if A assigns to B for life and then to C the whole term will pass to B at common law and C will take nothing.

The statute of uses did not change these rules for it applied only when one person is *seised* to another's use. Estates for years could be created under the statute by an agreement by one having a freehold to stand seised to another's use,¹¹¹ but once created, the term could not be transferred by any method of conveyance operating under the statute. In England today, therefore, it is common to create a trust when future interests in terms are settled.¹¹² Nor did the statute of wills have any effect on bequests of chattels real. It was settled in *Manning's Case*¹¹³ that executory bequests of chattels are good, and since that time a bequest of a term to A for life and then to B will carry the whole term to A, subject to B's executory interest. It has been held, however, that if a chattel real is bequeathed to A for life the executor has a reversionary interest after A's death,¹¹⁴ tho it were difficult to defend this result if B's interest was executory in the other case.

109. Before entry, the lessee would have but an *interesse termini* which is assignable. Whether a term created to begin *in futuro* can be remote and therefore void on account of the rule against perpetuities, see 29 Law Quarterly Review 303, 30 Law Quarterly Review 66.

110. *Welton v. Elkington* (1578) Plowden 519, 520; Gray, Perpetuities (3d ed.) § 809 *et seq.*

111. It was for this reason that conveyances by lease and release were invented. To avoid entry and the statute of enrolments, A, desiring to convey to B, leased to B for a year and then released to him. The lease operated by way of bargain and sale, the release operated at common law, really as a grant.

112. Goodeve, Personal Property (5th ed.) p. 7.

113. (1609) 8 Co. 94b. See Gray, Perpetuities (3d. ed.) § 813.

114. *Eyres v. Faulkland* (1697) 1 Salk. 231. The executor's interest was called a possibility of reverter. See Gray, Perpetuities (3d. ed.) § 820.

Chattels Personal. The common law permitted the transfer of a chattel personal *in futuro*, tho it had to be by deed. Tho a bailment for years was always enforceable, the creation of successive future interests was not allowed. It was said that a "gift or devise of a chattel for an hour is forever."¹¹⁵ But the doctrine of *Manning's Case* was extended to chattels personal and executory interests were allowed to be created by will or by transfer to trustees.¹¹⁶ As early as the seventeenth century it was possible to bequeath chattels personal to A for life and then to B, for B was conceived to have the legal interest and A but the use and occupation.¹¹⁷ Current opinion in England seems to regard all future interests in chattels as susceptible of creation only in equity, or perhaps by executory bequest. It may be doubted whether any future limitation of chattels real or personal can be made in England by a transfer *inter vivos* without resorting to equity.¹¹⁸ Neither the statute of uses nor the statute of wills had any application to chattels personal.¹¹⁹

7. *The Missouri Statutes.* The common law adopted in 1816 would seem to have been as it is now in England. But in the United States generally remainders in chattels personal are well recognized,¹²⁰ and executory interests are created without much distinction between deeds and wills.¹²¹ The Missouri stat-

115. Bro. Ab. Devise, 13. Professor Ames ascribed the doctrine of the text to procedural history. See 3 Harvard Law Review 313. But Professor Gray thought it due to the late invention of the conception of executory interests. See Gray, *Perpetuities* (3d ed.) § 824.

116. See Fearn, *Contingent Remainders*, p. 405; Gray, *Perpetuities* (3d ed.) § 829.

117. *Hide v. Parratt* (1696) 2 Vern. 331. The distinction between the gift of the use of a thing and a gift of the thing itself has now been exploded in England. Williams, *Personal Property* (16th ed.) p. 359.

118. The English writers still say that there can be no remainder in a chattel real or personal. See Goodeve, *Personal Property* (5th ed.) p. 8; Williams, *Personal Property* (16th ed.) p. 45; 2 Jarman, *Wills* (6th ed.) p. 1453. Consumable goods, *quae ipso usu consumuntur*, are not susceptible of successive limitations and any gift of them must be absolute. *Randall v. Russell* (1817) 3 Mer. 190.

119. "Future interests in personalty owe nothing to statutes; they are what they are by the common law." Gray, *Perpetuities* (3d ed.) § 845.

120. *State ex rel Farley v. Welsh* (1913) 175 Mo. App. 303. The difference between the English and American law is probably due to Blackstone's influence on the latter. 2 Blackstone, *Commentaries*, p. 398.

121. See Gray, *Perpetuities* (3d ed.) § 844.

utes have not converted terms for years into real property, tho the chapter on conveyances¹²² provides that the term "real estate" as used therein "shall be construed as coextensive in meaning with lands, tenements and hereditaments, and as embracing all chattels real."¹²³ The statute authorizing the creation of estates of freehold or inheritance *in futuro* by deed as by will does not apply to personal property, for no estate of freehold or inheritance can be created in personal property.¹²⁴ The common law as to the creation of executory interests in chattels real and personal has not been changed by any Missouri statute.

8. *The Missouri Decisions.* Tho outside of the recent decision in *State ex rel. Farley v. Welsh*¹²⁵ the possibility of a remainder after a life interest in a chattel has received little attention from the Missouri courts, it may be taken to be a settled thing in Missouri law. A gift of a chattel real or personal by deed or will to A for life and then to B, will confer a legal interest in remainder on B unless the goods are such that their use will mean their consumption,¹²⁶ tho in English law B would be said to have but an executory interest. A transfer of a chattel to A absolutely, but on an event to B will raise the question here to be considered.

Chattels real. The writer has found but one Missouri case involving the creation of an executory interest in a chattel real, viz., *Straat v. Uhrig*,¹²⁷ and in later comments on this case the fact that it involved the gift of a chattel real has not been noticed.¹²⁸ By deed, A transferred a term for ten years to B in

122. Revised Statutes 1909, § 2822.

123. *Orchard v. Wright-Dalton-Bell-Anchor Store Co.* (1909) 225 Mo. 414.

124. In *Blair v. Oliphant* (1845) 9 Mo. 239, the court said that "the statute which makes terms for years dowable must be understood as placing them in all respects upon a footing with descendible freeholds." But this was unnecessary to the decision, and it has been disapproved in *Orchard v. Wright-Dalton-Bell-Anchor Store Co.* (1909) 225 Mo. 414.

125. (1913) 175 Mo. App. 303. See also *Riggins v. McClellan* (1859) 28 Mo. 23; *Lewey v. Lewey* (1864) 34 Mo. 367.

126. See *Gregory v. Cowgill* (1854) 19 Mo. 415; *Allen v. Claybrook* (1874) 58 Mo. 124, 131.

127. (1874) 56 Mo. 482.

128. In *Gibson v. Gibson* (1911) 239 Mo. 490, 501; *Cornwell v. Wulff* (1898) 148 Mo. 542, 565, 577.

trust for C, a *feme covert*, for her sole and separate use, and B covenanted and agreed to permit C to convey as directed by C by will or otherwise in writing and in default of any appointment by C to convey after her death to the children of C and D. It was said that this deed created an absolute trust estate in C "with a springing contingent trust in favor of her children," and the court held that after C's death without having made an appointment, B was entitled to receive the rents in trust for the children.¹²⁹ The court said that the deed was "in the ordinary form of a deed of bargain and sale under the statute of uses," but this does not mean that it operated under the statute of uses for there being no seisin in A, the statute did not apply. The deed operated as an assignment to the trustee who took the whole legal estate, and even in England the equitable interest of the children would have been enforced.¹³⁰ The case is therefore no authority for the creation of an executory interest in a term by deed, without the interposition of trustees, and it cannot yet be said whether the Missouri courts will follow the English rule forbidding such interests to be created by deed. The meager authorities in other states do not admit of the hazard of a guess.¹³¹

There should be no doubt as to the validity of an executory bequest of a term for years in Missouri, for there can be no sound reason for a refusal to follow *Manning's Case*.¹³²

129. It was erroneously said in *Gibson v. Gibson* (1911) 239 Mo. 490, 501, that *Straat v. Uhrig* "held the remainder valid." This error had been made in a dissenting opinion by MARSHALL, J., in *Cornwell v. Wulff* (1898) 148 Mo. 543, 577. The criticism of *Straat v. Uhrig* in the majority opinion in the latter case, p. 565, was made without any reference to the fact that it involved a chattel real.

130. The effect of the added power of disposition on the limitation over might have made it bad, however. *Vide post*, p. 40.

131. In Maryland, an executory interest in a term may be created either by deed or will. *Culbreth v. Smith* (1888) 69 Md. 450. See Gray, *Perpetuities* (3d ed.) p. 816.

132. In *Halbert v. Halbert* (1855) 21 Mo. 277, the court referred to a quotation concerning *Manning's Case* with apparent approval of its doctrine. The doctrine of *Manning's Case* was approved in *Waldo v. Cummings* (1867) 45 Ill. 421, 427 and in *Welsh v. Belleville Savings Bank* (1879) 94 Ill. 191, 204. See Kales, *Future Interests in Illinois*, § 186.

Chattels personal. There are several early cases which involved future interests in slaves. In *Wilson v. Cockrell*,¹³³ a gift of certain slaves was made by deed in consideration of love and affection to Juliet, her executors, administrators and assigns, and of certain other slaves to William in like manner, with a proviso that if either Juliet or William should "die without heirs, then the property of the one so dying shall absolutely vest in the other."¹³⁴ After the death of Juliet without issue, William brought replevin for a female slave against a purchaser from Juliet. The gift over to William was held void, apparently on the ground that no executory limitation of a chattel could be made by deed, and the court seems to have thought future interests in chattels created by deed to be subject to the same restrictions as future interests in land created by common law conveyances. The Kentucky court's decision in *Betty v. Moore*¹³⁵ was relied on, but it can be rested on a Kentucky statute. The authority of *Wilson v. Cockrell* is very much weakened by the fact that the gift over was clearly bad for remoteness, tho this fact escaped the court's attention.¹³⁶ In *Vaughn v. Guy*,¹³⁷ the court said that "there can be no doubt of the correctness of the principle asserted in *Wilson v. Cockrell*," and in *Halbert v. Halbert*¹³⁸ the doctrine of *Wilson v. Cockrell* was again asserted tho it was not essential to the disposition made.

133. (1843) 8 Mo. 1. Judge Napton was absent when the case was argued and probably did not participate in the decision, which may therefore represent the opinion of but two judges.

134. The words quoted are from the language of the court, and were probably not the *verbatim* terms of the deed. The words "die without heirs" were probably used for "die without heirs of the body." Even so, the gift over was remote. See 3 Law Series, Missouri Bulletin, p. 7.

135. (1833) 1 Dana 235. See 3 Law Series, Missouri Bulletin, p. 8, note 42.

136. See 3 Law Series, Missouri Bulletin, pp. 8-9, note 48; Gray, *Perpetuities* (3d ed.) § 91, note.

137. (1853) 17 Mo. 429. The court said in *Vaughn v. Guy* that the statute making failures of issue definite, Revised Statutes 1845, c. 32, § 6, had abolished "the distinction between the construction of limitations created by deed, and those whose existence depends on wills and conveyances under the statute of uses." This must refer only to the distinction drawn in *Forth v. Chapman* (1720) 1 P. Wms. 663. See 3 Law Series, Missouri Bulletin, p. 9, note 48.

138. (1855) 21 Mo. 277. See the comment on *Halbert v. Halbert* in 3 Law Series, Missouri Bulletin, p. 9.

The bequest over in *Chism v. Williams*¹³⁹ would apparently have been upheld but for its being on an indefinite failure of issue and therefore remote, and the court refused to consider the previous decisions in which the gift was by deed. The decision in *State ex rel. Haines v. Tolson*¹⁴⁰ is very surprising after *Chism v. Williams*. A testator gave certain real and personal property to A with a limitation over to B in the event of A's death without issue. The action against the administrator *de bonis non cum testamento annexo* concerned the money so given. The gift over was held to be on a definite failure of issue and not remote,¹⁴¹ but as A took the entire property and not a mere life estate the limitation over was held to be "void for repugnancy."¹⁴² But such repugnancy characterizes every shift-

139. (1860) 29 Mo. 288.

140. (1880) 73 Mo. 320.

141. See 3 Law Series, Missouri Bulletin, p. 11.

142. Three cases were cited by the court: *Rubey v. Barnett* (1848) 12 Mo. 6, *Allen v. Claybrook* (1874) 58 Mo. 124, 131, *Amelia Smith's Appeal* (1854) 23 Pa. St. 9. None of these sustains the result reached. In *Rubey v. Barnett*, a life estate was given. In *Allen v. Claybrook*, at p. 131, the reference is to a general gift with a power of disposition; there was no power of disposition in *State ex rel. Haines v. Tolson*. The decision in *Amelia Smith's Appeal* was on the ground that words which create an estate tail in land create an absolute interest in chattels, but the words in question created an estate in the land also devised only by implication, and the implication would seem to have been improper. There were similar words in *State ex rel. Haines v. Tolson*. The validity of the gift over of the personalty was not really involved in *Amelia Smith's Appeal*, for the court of probate was declaring only the distribution at the death of the testator. An executory bequest after a bequest to A and the heirs of his body should be held good, unless it is remote. Such a gift of a leasehold was upheld in *Lamb v. Archer* (1673) 1 Salk, 224. See Gray, *Perpetuities* (3d ed.) § 357, note. But if the contrary were conceded, as seems to have been Jarman's opinion, 2 Jarman, *Wills* (6th ed.) p. 1202, yet words which would give a fee tail in realty only by implication ought not to be construed to create an interest in personalty so absolute as to invalidate any executory bequest. Even if *Amelia Smith's Appeal* be sustained on this point, it should be noticed that it depended upon an indefinite failure of issue, for the Pennsylvania statute making failures of issue definite was not enacted until 1897. See Foulke, *Perpetuities in Pennsylvania*, p. 196, note. The gift over was therefore void for remoteness, unless the rule of *Forth v. Chapman* (1720) 1 P. Wms. 663, could save it. Whereas in *State ex rel. Haines v. Tolson* it was distinctly held that the gift over was on a definite failure of issue, if indeed the statute did not impel this result. A gift over of a chattel on a definite failure of issue is good. *Stone v. Maule* (1829) 2 Sim. 490;

ing interest,¹⁴³ and if this were a sufficient reason no executory shifting interest ought to be creatable by deed or will—and there can be no reason why real and personal property should be treated differently in this respect. Yet the court had previously purported to uphold an executory devise of lands in *Faust v. Birner*.¹⁴⁴ As a decision that a shifting executory bequest of a chattel personal is void, *State ex rel. Haines v. Tolson* is opposed to a long and unbroken line of authorities in other jurisdictions.¹⁴⁵ Later comments have failed to point out its peculiarity.¹⁴⁶

There seems to have been no later decision in which an executory interest was created in a chattel, except in cases where the first taker was expressly given a power of disposition and these cases will be considered separately. As the law stands therefore, an executory interest to take effect on the death of the first taker without issue cannot be created in a chattel personal by deed, for *Wilson v. Cockrell* has not been overruled tho it can be distinguished on the ground of the remoteness of the gift; nor by will, if the gift is on the event that the first taker who is given an absolute interest should die without issue living at his death, tho *State ex rel. Haines v. Tolson* may be limited to its very facts when occasion arises. If a picture were given to A and his executors, with a proviso that if a certain painter, X, should come to Columbia to live it should belong to X, the gift ought to be upheld if made in a will in spite of *State ex rel. Haines v. Tolson*, and it is submitted that

Smith, Executory Interest, § 600. This is recognized in *In re Moorhead's Estate* (1897) 180 Pa. 119, by the same court which decided *Amelia Smith's Appeal*.

143. For a discussion of various uses of the term "repugnancy," see Kales, Future Interests, §§ 141, 173.

144. (1860) 30 Mo. 414, *Infra*, p. 14. See also *Harbison v. Swan* (1878) 58 Mo. 147.

145. See Gray, Perpetuities (3d ed.) § 848, note 5. A statement in Washburn, Real Property (6th ed.) § 1781, supports the Missouri court's decision. *Merrill v. Emery* (1830) 10 Pick. 507, is there cited, but that case may be explained on other grounds. See also Theobald, Wills (5th ed.) p. 565.

146. *State ex rel. Haines v. Tolson* seems to have been approved in *Munro v. Collins* (1888) 95 Mo. 33. It was justified in *Cornwell v. Orton* (1894) 126 Mo. 355, 369, on the ground that "it was an attempt to limit a remainder on a fee," which of course was a mistake.

this would not involve overruling that case; it should also be upheld if made in a deed, tho the English law seems *contra*, for *Wilson v. Cockrell* is likewise to be limited to its facts. But the careful lawyer will not take the risk, and the gift to X should be accomplished by means of a trust which would make it good beyond question.

There may be some doubt as to the validity of an executory bequest of a chattel real, also, since an executory bequest of a chattel personal may be void.

III EXECUTORY LIMITATIONS FOLLOWING POWERS OF DISPOSAL

Assuming that an executory limitation of realty or personalty is good whether it is contained in a deed or a will, a special class of cases must be considered in which the first taker is given a power of absolute disposal and the limitation over is to take effect in the event of his failure to exercise it. In such cases it will make no difference whether the limitation is in a deed or a will. If a demise or a devise is made to A and his heirs, with a proviso that if A goes into the army then the land is to go to B and his heirs, we shall assume that the limitation to B is good; indeed, there would have been no doubt of it except for the Missouri decisions previously reviewed. If the proviso be that if A dies without having gone into the army then the land is to go to B and his heirs, B would have a valid executory interest. Yet in both cases A by doing or refraining from doing some act might defeat the executory limitation to B. If the land were limited to A and his heirs subject to a power given to B to appoint by deed or will to his children and with a proviso that in default of appointment by B the land should go to C and his heirs, there can be no doubt of the validity of the limitation to C. But if the limitation is to A and his heirs¹⁴⁷ with full power to convey or devise the absolute fee simple, and with a proviso that if he does not exercise the power the land

147. The common law requirement of the use of the word "heirs" in creating a fee simple was abrogated in Missouri as to devises in 1825, Revised Statutes 1825, p. 795, § 19; and as to deeds in 1835, Revised Statutes 1835, p. 119, § 2.

shall go to B and his heirs, then the limitation to B is said to be void.¹⁴⁸ If the gift is to A for life with full power to convey or devise the fee and with a proviso that if he does not convey or devise it the land shall go to B and his heirs, then the limitation to B is good.¹⁴⁹ Just why this difference? The cases will be reviewed to determine the reason for such a rule and the effect which it has had on the construction of instruments.

The Missouri cases refer the origin of this rule in Missouri to the harmless statement made *obiter* in *Rubey v. Barnett*¹⁵⁰ that an unlimited gift to one who is given a general power of disposal carries the fee; it is not at all clear that the court had in mind the question of the validity of a limitation over, for it was addressing itself to the question of whether a devisee took for life or in fee and it held that only a life estate had been given.¹⁵¹ In *Gregory v. Cowgill*,¹⁵² it was clearly held that one to whom real and personal property was given for life did not take a greater interest by reason of a gift over of what might remain at his death.¹⁵³ In *Jecko v. Taussig*,¹⁵⁴ a deed conferred on the first taker a power to convey the "fee" and the estate was not expressly limited to a life estate; the only question before the court was as to the power of the first taker to convey an "absolute fee," but it seems to have been of the opin-

148. It should be noted that A may convey the fee subject to the limitation over without any special power being given to him; and if the added power does not give him power to convey the fee free from the gift over, the rule here being considered does not apply.

149. The limits of this study do not admit of a determination of the sufficiency of various expressions for conferring powers of disposal on life tenants. On this subject see a valuable article by Professor Kales in 7 Illinois Law Review 504.

150. (1848) 12 Mo. 3. While the court cited *Jackson v. Robins* (1819) 16 Johns. 587, there was apparently no appreciation of the actual decision in that case.

151. See also *Norcum v. D'Oench* (1852) 17 Mo. 98, where a life tenant had a power which was exercised.

152. (1854) 19 Mo. 415. Some of the personalty was perishable and such that use would consume it. The court seems to have thought that no power of disposition was conferred on the life taker, the expression as to remaining property being construed to carry an absolute interest in the perishable personalty. Cf. *Reinders v. Koppelman* (1878) 68 Mo. 482, 492.

153. Cf. *Foote v. Sanders* (1880) 72 Mo. 616.

154. (1869) 45 Mo. 167.

ion that the gift over on non-exercise of the power was good—it was said to be “contingent on the non-exercise of the power.” It is submitted that this is a distinct recognition of a contingent executory limitation by deed, tho it was *obiter*.¹⁵⁵

In *Green v. Sutton*,¹⁵⁶ there was a bargain and sale to A and his heirs to the use of B and such uses as B might appoint and in the event of B's dying intestate to the heirs of C. B died intestate before C died. The court seems to have held that B did not take for life only, and that the limitation over was therefore void as a *remainder*. It is difficult to ascertain just the ground of the decision for the court spoke of a “power of absolute disposal, which can only be had by the holder of the fee” and admitted in the next paragraph that a life tenant could be given a power of disposal; it also said that “this was not intended to be a limitation over,” from which we may infer that the court did not intend to hold that an executory limitation was void.¹⁵⁷ As a contingent remainder following a life estate, the future interest failed because of the impossibility of ascertaining the persons to take when the particular estate ended. *Green v. Sutton* is of dubious authority because of the uncertain reasoning of the court.¹⁵⁸

155. The actual decision in *Jecko v. Taussig* would have been the same if the first taker had but a life estate; but in that event the gift over should have been called a vested remainder which could have been divested by an exercise of the power. See also, *Hazel v. Hagan* (1871) 47 Mo. 277. The court seems to have admitted that such a remainder was contingent on the non-exercise of the power, in *Grace v. Perry* (1906) 197 Mo. 550.

156. (1872) 50 Mo. 186.

157. *Jackson v. Robins* (1819) 16 Johns. 288 and *Pulliam v. Byrd* (1847) 2 Strob. Eq. 134, were cited by the court. The gift in the latter case was very clearly for the life of the first taker and there was no gift over in the event of the non-exercise of the power; so that the decision is authority for the proposition only that the life tenant did not take the fee as a consequence of the power of disposal. *Pulliam v. Byrd* is therefore no authority for *Green v. Sutton*. *Jackson v. Robins* will be considered *post* in the connection with the origin of this rule.

158. Judge Bliss wrote the principal opinion, in which Judge Wagner concurred. Judge Adams concurred in result, briefly stating that the limitation over failed because of the non-ascertainment of the persons to take when the first taker died, tho he apparently failed to perceive that this was only necessary if the future estate was a remainder.

*Straat v. Uhrig*¹⁵⁹ is a clear decision upholding the limitation over in spite of the first taker's power of disposal. A leasehold was assigned by deed to a trustee for A, who was given full power to dispose of it, and in the event of no disposal the trustee was to convey to the children of A and B when they reached twenty-one. The court's opinion, concurred in by four very able judges, was that A took an absolute trust estate with a valid shifting (erroneously called springing) limitation to the children. The decision was not achieved blindly, for the counsel had contended for an application of the rule which would have made the limitation over void.¹⁶⁰

The next case¹⁶¹ of a limitation over following a fee with absolute power of disposal was *Tremmel v. Kleibolt*.¹⁶² A conveyed certain lands to B in trust for C, A's wife, and the trustee covenanted to convey as directed by C by deed or will, and in default of C's exercise of the power to convey to C's heirs; the trustee conveyed to C's heir after C's death, and the heir brought ejectment against A, her father, who held possession as tenant by curtesy. In giving judgment for the defendant the court stressed the fact that A had not intended to deprive himself of curtesy, but it seems to have said also that C took the whole estate fol-

159. (1874) 56 Mo. 482.

160. *Rubey v. Barnett* and *Jackson v. Robins* were both cited in the argument. Nor is the decision weakened by the fact that the gift over was to A's children who would have benefitted, even if A had been given the absolute interest; for the issue was between the trustee and A's administrator, and the decision had the same effect as tho the gift over had been to persons unrelated to A. *Straat v. Uhrig* was severely criticized by *Gantt, C. J.*, in *Cornwell v. Wulff* (1898) 148 Mo. 542, 565.

161. In *Carr v. Dings* (1873) 54 Mo. 95, (1874) 58 Mo. 400, the first devisee had but a life estate by force of the fact that the property was "to be used and appropriated in and about her maintenance and support." In *Bryant v. Christian* (1874) 58 Mo. 98, the devise was expressly for life. In *Allen v. Claybrook* (1874) 58 Mo. 124, no power of disposal was given to the first taker. So, too, in *Pollard v. Union National Bank* (1877) 4 Mo. App. 408. In *Reinders v. Koppelman* (1878) 68 Mo. 482, it was held that the life estate was not enlarged into a fee by the addition of a power of disposal. In *Foote v. Sanders* (1880) 72 Mo. 616, both realty and personalty were given to A for life, and "what then remains" was given over; the court held that A took no power of disposal of the realty, since the quoted words could refer to the personalty. In *Boyer v. Allen* (1882) 76 Mo. 498, the power to convey was clearly exercised.

162. (1881) 75 Mo. 255. Also reported in (1879) 6 Mo. App. 549.

lowing *Green v. Sutton*¹⁶³ and that the gift over was void as a remainder. All of this was unnecessary, however, for even if the gift over was good as an executory limitation A would have been entitled to curtesy,¹⁶⁴ and if this were not true the case is weakened by the fact that the heirs of C would have taken anyway by descent from C.

The facts of *Wead v. Gray*¹⁶⁵ are more complicated. A, the maker of several notes, gave deeds of trust to secure them and died leaving a will in which his property was given to C. Notes secured by a second deed of trust were bequeathed by B to C who was given full power of disposal during her lifetime with a gift over to D in the event of her failure to exercise it. C devised her property to D, who sought to have the deed of trust given by A cancelled on the ground that when the notes came into C's hands the deed of trust could no longer be alive because of her holding the equity of redemption. B's administrator resisted the cancellation and was sustained by the St. Louis Court of Appeals which held that the gift over to D was good as an executory devise, that C could not exercise the power by will, and that there was no "merger." The Supreme Court, however, decreed the cancellation and expressed the opinion that the gift over to D was bad as "an abortive effort to give to one the absolute property, and at the same time to engraft a remainder upon it," relying mainly on *State ex rel. Haines v. Tolson*, in which, as has been pointed out, there was no added power of disposal. No reason is assigned for this invalidity except that the gift over was "inconsistent," and yet the court itself admitted the possibility of executory limitations when not preceded by powers of disposal. The Supreme Court also expressed the opinion that C's power of disposal included the power to bequeath the notes. On this theory, the gift over to D was of course defeated by the

163. The court also relied on *Cushing v. Blake* (1879) 30 N. J. Eq. 689, but that case rested on the rule in *Shelley's Case* and was therefore of no authority in Missouri.

164. *Buckworth v. Thirkell* (1785) 1 Coll. Juris. 322. See also *Tiffany, Real Property*, § 183. *Tremmel v. Kleiboldt* was misconceived by MARSHALL, J., in *Cornwell v. Wulff* (1898) 148 Mo. 542, 577.

165. (1880) 8 Mo. App. 515, (1883) 78 Mo. 59.

bequest, and it was unnecessary for the court to express any opinion as to its validity.¹⁶⁶ The decision may be distinguished on this important ground, therefore.

*Harbison v. James*¹⁶⁷ presented a question of conflict of laws which did not receive the attention which it merited and which has been neglected in subsequent comment. A testator domiciled in Kentucky died there leaving property in Kentucky which he devised to his wife with power to sell and re-invest, and "at her death any portion remaining undisposed of" was given to his daughters. The wife invested some of the proceeds in Missouri. Plainly any rights in this Missouri property depended on the effect of the will, which was determined solely by Kentucky law. The Kentucky court had passed on the same will in *Anderson v. Hall*,¹⁶⁸ and the Missouri court referred to the decision with approval but seems to have thought it was applying the Missouri rule in determining that the wife took but a life estate with a valid remainder to the daughters. It is submitted that *Anderson v. Hall* was controlling, and the decision of *Harbison v. James* is, therefore, of little importance in Missouri in spite of the frequency with which it has been cited. The actual decision did not involve the validity of the limitation over.¹⁶⁹

*Gaven v. Allen*¹⁷⁰ presents a peculiar situation. A testator devised land to his wife, with a gift over in the event of her

166. See the comment in *Munro v. Collins* (1888) 95 Mo. 33, 38. It may also be noted that the gift of the notes to C, who held the equity of redemption in the land, may have been held to have cancelled the security for the notes even tho the gift over were good and not defeated.

167. (1866) 90 Mo. 411. In *Russell v. Eubanks* (1884) 84 Mo. 82, the first devisee took for life only. In *Bean v. Kenmuir* (1885) 86 Mo. 666, there was no added power to convey tho the first taker was to hold to herself and "her heirs and assigns" forever. The power given to the first taker in *Hardy v. Clarkson* (1885) 87 Mo. 171, was exercised and what was said about the gift over was therefore *obiter*.

168. (1882) 80 Ky. 91. Cf. *Sniively v. Sniively* (Ky., 1915) 172 S. W. 911.

169. In *Munro v. Collins* (1888) 95 Mo. 33, the litigation concerned personal property which was bequeathed to the testator's widow "to be held and enjoyed by her as her own" and "after death, such of said property as shall then be in her possession" was given to the testator's daughter. The court held that the wife had only a life interest without a power of disposal, and said that the later quoted words had reference to the consumable personalty. See also *Cook v. Couch* (1889) 100 Mo. 29.

170. (1889) 100 Mo. 293.

re-marriage, and gave her a power of sale; the widow sought specific performance by one who agreed to buy the land and who contended that she could not convey a "perfect title in fee." It was held that the wife had only a "qualified fee," but that she could convey a perfect title in fee. While the result would have been the same if the gift over had been held to be void, the court very clearly thought it was good. It should be noted that the event on which the limitation over was made, was in no way connected with the exercise of the power.

The question of the validity of an executory limitation after a full power of disposal was squarely presented in *Cornwell v. Orton*.¹⁷¹ Land was conveyed by deed to A and his heirs in trust for B, who was to have full power to convey or devise, and in the event of a failure to exercise the power the trustee was to convey to C and his heirs. The court¹⁷² held that B's interest was not limited to a life estate and that the limitation to C was void. No reason was assigned for the latter, except that a remainder cannot be limited after a fee. The limitation over was said to be repugnant, for which the court relied upon *Green v. Sutton* and *Tremmel v. Kleiboldt* and repeated the dictum of *Rubey v. Barnett* that "a power to dispose of a thing as one pleases, must necessarily carry along with it a full property in it." The decision was reviewed by the court *en banc* in *Cornwell v. Wulff*¹⁷³ a few years later, and for the first time the court was forced into an analysis of the principle and its foundation, and while it admitted the possibility of an executory limitation in a deed, it refused to change its ruling that an executory limitation after an absolute power of disposition in the first taker is void. No reasons were given for such a proposition but the

171. (1894) 126 Mo. 355. In *Lewis v. Pitman* (1890) 101 Mo. 281 and in *Redman v. Barger* (1893) 118 Mo. 568, the first taker was held to have a life estate, tho this construction was in both cases influenced by the acceptance of the notion that the gift over would have been void if the first taker had taken a fee. See also *Greffet v. Willman* (1892) 114 Mo. 106; *Schorr v. Carter* (1893) 120 Mo. 409; *Evans v. Folks* (1896) 135 Mo. 397.

172. Division number two, composed of GANTT, BURGESS, and SHEERWOOD, JJ.

173. (1898) 148 Mo. 542.

court relied upon *Ide v. Ide*¹⁷⁴ and *Jackson v. Bull*¹⁷⁵ and Chancellor Kent's statement.¹⁷⁶ *Green v. Sutton* was also relied on, and *Straat v. Uhrig* was emphatically disapproved. Curiously enough, the dissenting judges¹⁷⁷ did not deny that the limitation over was void if the first taker took a fee, but they relied on *Lewis v. Pittman*¹⁷⁸ in asserting that the first taker took only a life estate. All of the judges agreed that the limitation after a power of disposal was void, if the first taker got a fee; yet no reasons were given beyond the citations, and *Green v. Sutton* was not clear enough to have produced such unanimity.

In later decisions the issue has usually been whether a life estate or a fee was given to the first taker and it has uniformly been admitted that if a fee has been given the gift over is void. Since the clear statement of this principle in *Cornwell v. Wulff*, the court has shown a disposition to follow *Lewis v. Pittman* and hold that a life estate has been conferred on the first taker even in the absence of express words, in order to avoid the invalidity of the gift over.¹⁷⁹ In *Walton v. Drumtra*,¹⁸⁰ the deed was in all respects like that in *Cornwell v. Wulff* but it was held that the gift over was valid because the first taker took but a life estate, tho the court lapsed into confusion and spoke of the gift over as taking effect as an executory limitation. An attempt was made¹⁸¹ to distinguish *Cornwell v. Wulff* on the ground that the

174. (1809) 5 Mass. 500.

175. (1813) 10 Johns. 19.

176. 4 Kent, Commentaries, 270. In thus referring to the origin of this rule, the court ought to have referred to Professor Gray's classic criticism of the cases cited, which had then been published several years; a reference to it might have changed the decision.

177. SHERWOOD, BRACE and MARSHALL, JJ. Judge SHERWOOD had changed his mind after the decision in *Cornwell v. Orton*.

178. (1890) 101 Mo. 281.

179. See *McMillan v. Farrow* (1897) 141 Mo. 55, in which the gift over was of what remained at the death of the first taker; and *Cross v. Hoch* (1899) 149 Mo. 325.

180. (1899) 152 Mo. 189. The decision follows an earlier construction of the same deed by the federal court in *Yore v. Yore* (1874) 63 Fed. 645; but the federal court apparently did not consider the possibility of the gift over taking effect as an executory limitation.

181. See the opinion of BURGESS, J., on p. 503, and the opinion of GANTT, C. J., on p. 511. The latter judge also attempted to distinguish *Cornwell v. Wulff* as a case of an executed trust, but this seems immaterial unless the active trustee be clothed with discretion to de-

deed in that case contained no gift over, but this was a patent misstatement of the facts. A majority of the court admitted that *Cornwell v. Wulff* had been improperly decided on the ground that the deed ought to have been held to have given the first taker only a life estate, and *Walton v. Drumtra* must be taken to have overruled *Cornwell v. Wulff* for a majority of the court saw no distinction between the two cases.

*Roth v. Rauschenbusch*¹⁸² was decided by two of the judges who had stood up for *Cornwell v. Wulff*. The limitation over had been defeated by a conveyance by the first taker, and the devisees of the gift over sought to avoid the conveyance on the ground that it was the result of undue influence practiced upon the first taker; but the court held that they had no standing in court for the limitation over was void as an executory devise because "such a limitation is inconsistent with the absolute estate and power of disposition *expressly given or necessarily implied* from the will."¹⁸³ The same judges also decided *Jackson v.*

termine the shares of the beneficiaries, and the court did not subscribe to it. ROBINSON, J., who concurred in the majority opinion in *Cornwell v. Wulff*, had changed his mind since the decision of that case and expressed the opinion that it was wrongly decided. This puts *Cornwell v. Wulff* in the position of having been decided by three out of seven judges, and disapproved in *Walton v. Drumtra* by four out of seven.

182. (1903) 173 Mo. 582. The decision was by two judges of division number two; Fox, J., did not sit. The decision represents the opinion of GANTT and BURGESS, JJ. ROY, C., speaking of *Roth v. Rauschenbusch* in *Gibson v. Gibson* (1911) 239 Mo. 490, said that the division which decided it "assumed the responsibility of overruling in effect, the decision of the full court in *Walton v. Drumtra*." But it is submitted that he failed to note that the problem before the court in each case was one of construction, and that the terms of the will in the later case were not exactly the same as those of the deed in the earlier case.

183. In *Gannon v. Albright* (1904) 183 Mo. 238, the event on which the limitation over was made did not occur, tho the court was clearly of opinion that the limitation over was void; and later in *Gannon v. Pauk* (1906) 200 Mo. 75, it was held that the power had been exercised by the first taker. In *Papin v. Peidnoir* (1907) 205 Mo. 521, the first taker was held to have properly exercised the power. See also *Grace v. Perry* (1906) 197 Mo. 550; *Armor v. Frey* (1909) 226 Mo. 646; *Threlkeld v. Threlkeld* (1911) 238 Mo. 459. In *Young v. Robinson* (1906) 122 Mo. App. 187, the Kansas City Court of Appeals purported to hold a gift over void in reliance on *Roth v. Rauschenbusch* and *Gannon v. Albright*, but there was little analysis of the gift and it is not clear that there was an absolute power of disposal.

Littell,¹⁸⁴ in which, tho it was unnecessary to the decision, they said that a limitation over would be void; it is not clear that the court thought there was a limitation over, however.

Such were the precedents when in *Gibson v. Gibson*,¹⁸⁵ Roy, C., sought to clear away the confusion of the decisions and to establish the rule of *Walton v. Drumtra*; but the actual facts did not warrant the attempt, for the first taker was made a trustee for those later entitled and there was no limitation after a fee with added power of disposal. The result of *Gibson v. Gibson* ought not to have been different if the first taker had been held to have had the fee, and in spite of the court's statement that she took but a life estate it would seem that she must have had a fee in order to carry out her duties as trustee. *Gibson v. Gibson*, therefore, settled nothing and the review of the decisions was apparently made without appreciation of the real issue around which the conflict had raged.¹⁸⁶

This completes a review of the cases. It is submitted that only three of the decisions cannot be rested upon some other ground than the impossibility of a valid executory limitation after a fee with added power of disposal—those three are *Green v. Sutton*, *Cornwell v. Wulff*,¹⁸⁷ and *Roth v. Rauschenbusch*. Of these the opinion in *Green v. Sutton* is by no means clear and at least one of judges may have rested the result on the failure of a contingent remainder because the contingency had not happened dur-

184. (1908) 213 Mo. 589. Fox, J., took part and concurred.

185. (1911) 239 Mo. 490. The case was decided by division number two, composed of judges none of whom had participated in the former cases on this topic.

186. In *Burnet v. Burnet* (1912) 244 Mo. 491, the first taker was held to have but a life estate. In *Freeman v. Maxwell* (1914) 262 Mo. 13, the first taker was not given a power of disposal, tho the trustee was authorized to use the legacy for the support of the first taker. The court held that the first taker had only a life interest and WILLIAMS, C., said *obiter*, "Some of the cases cited hold that a remainder over, after what purports to be a devise of the fee, is void. But that is no longer the law of this state, as will appear from a reading of the case of *Gibson v. Gibson*, wherein the Missouri cases on the subject are reviewed and some of the cases cited by appellant are expressly overruled." This statement, it is submitted, is grossly inaccurate.

187. *Cornwell v. Orton* might also be included, but it is part of the same litigation as *Cornwell v. Wulff*.

ing the existence of the particular estate;¹⁸⁸ and *Cornwell v. Wulff* has been expressly overruled upon a ground which would unquestionably have left the limitation over valid. This leaves *Roth v. Rauschenbusch*,¹⁸⁹ which was decided by only two judges and which has since been disapproved on another ground.¹⁹⁰ Opposed to *Green v. Sutton* and *Roth v. Rauschenbusch* are *Straat v. Uhrig*, and the clear *dicta* in *Jecko v. Taussig* and *Gaven v. Allen*.

In view of this situation, is it too late to ask why there should be a rule that an executory limitation following a fee with added power of disposal is void? It is not a rule of construction adopted to effectuate intentions, but a rule of law, the avowed purpose of which is to defeat intentions. We have got rid of the rule in *Shelley's Case*—why has this artificial rule been invented? If testators' and grantors' intentions must be defeated by this rule, there ought to be some good reason for it. Yet no reason has ever been given by the Missouri court beyond the statement that the limitation over would be "inconsistent" or repugnant with an absolute estate given to the first taker. But every shifting executory limitation is likewise inconsistent or repugnant. When pressed for a better reason the court harks back to Chancellor Kent and to *Ide v. Ide*,¹⁹¹ *Jackson v. Bull*¹⁹² and *Jackson v. Robins*.¹⁹³ The American cases have been so thoroly analyzed by Professor Gray¹⁹⁴ that it would be useless to attempt any further exposition of them. Apparently the Missouri court has never seen Professor Gray's analysis, tho it has been cited in numerous modern treatises and decisions.

188. *Vide infra*, note 158.

189. *Young v. Robinson* (1906) 122 Mo. App. 187, might also be enumerated, since it follows *Roth v. Rauschenbusch*.

190. In *Gibson v. Gibson* (1911) 239 Mo. 490.

191. *Ide v. Ide* (1809) 5 Mass. 500 was decided solely on the authority of *Attorney General v. Hall* (1731) Fitz 114, which, as Professor Gray has shown, the court misread. *Attorney General v. Hall* was cited by the Missouri court in *Gibson v. Gibson* (1911) 239 Mo. 490, where the gift over was miscalled a remainder.

192. (1813) 10 Johns. 19.

193. (1819) 16 Johns. 637. Also reported in 15 Johns. 169.

194. Gray, *Restraints on Alienation* (2d ed.) § 67 *et seq.* See also the valuable study by Edward Brooks, Jr., in 32 *American Law Register*, n. s., p. 1035; and another by B. M. Thompson, in 1 *Michigan Law Review* 427, commented on in 16 *Harvard Law Review* 458.

Chancellor Kent¹⁹⁵ gave the reason for this rule to be that "an executory devise cannot be prevented or defeated by any alteration of the estate out of which, or after which it is limited."¹⁹⁶ It will be admitted that since the famous decision of *Pells v. Brown*¹⁹⁷ executory devises are not destructible as are contingent remainders; i. e., they are not in their nature destructible interests, and if the first taker is not specially given a power to destroy the executory limitation he certainly cannot do so. But what is there in reason or in policy to prevent the creator of the estate from conferring on the first taker the power to destroy a subsequent limitation? And if it be conceded that this cannot be done, were it not more logical to say that the power of destruction is bad instead of saying that the gift over is void?

Nor does there seem to be any valid objection to the gift over on the ground that it deprives the first taker's fee of one of its necessary incidents, viz., descent to the heirs in case of intestacy;¹⁹⁸ for this would invalidate an executory limitation over on the death of the first taker without issue where no power of disposal had been conferred, yet in such cases the gift over is unquestionably good.¹⁹⁹ A gift over by way of forfeiture upon alienation in a certain manner may be void on account of the public policy which demands free alienation of property;²⁰⁰ but this ought not to invalidate gifts on a failure to alienate.

A special reason may exist for holding gifts over of personal chattels void, where the first taker has an absolute power of disposal, viz., the uncertainty of the extent of the gift over and the difficulty of determining what is given over.²⁰¹ The American

195. In *Jackson v. Robins* (1819) 16 Johns. 537, 539. See also 4 Kent, Commentaries, p. 270.

196. See a defense of this statement in 2 Reeves, Real Property, § 954, note; and a criticism of it in Tiffany, Real Property, § 140, note.

197. (1620) Cro. Jac. 590.

198. This reason was suggested by Fry, J., in *Shaw v. Ford* (1877) 7 Ch. Div. 669, 673.

199. Gray, Restraints on Alienation (2d ed.) § 63.

200. Gray, Restraints on Alienation (2d ed.) § 55.

201. This reason was adopted in several English cases. See Gray, Restraints on Alienation (2d ed.) § 58. Professor Gray suggests that some reason may be found for the rule inasmuch as it protects the creditors of the first taker. § 74g. The Alabama statute which validates the gift over seems to make an exception in favor of creditors of the first taker. Cf. *Hood v. Bramlett* (1895) 105 Ala. 660.

cases have not gone upon this ground, however, but have treated gifts of personalty as governed by the same considerations which apply to realty.²⁰² It is obvious that the reason of uncertainty applies as well where the first taker is limited to a life interest, and is given a power of disposal, yet no one questions the validity of the gift over in this latter case.

In spite of its having no good reason to support it and of its operating to defeat intentions which are now so zealously sought to be effectuated, the rule has a firm hold in England²⁰³ and in many states in this country.²⁰⁴ The authorities are not unanimous,²⁰⁵ however, and many judges have condemned it.²⁰⁶

Is it possible for relief from this artificial rule to be secured without action of the legislature? The stability of titles demands continuity of decision with reference to rules concerning property. However, there is a difference between declaring void what was previously valid and declaring valid what was previously void, and the latter may be done when the former would be improper

202. But cf. *Mills v. Newberry* (1885) 112 Ill. 123 and the comment upon it in Kales, *Future Interests in Illinois*, § 171.

203. *Holmes v. Godson* (1856) 8 De G. M. & G. 152; *Shaw v. Ford* (1877) 7 Ch. Div. 669; *In re Jones* (1893) 1 Ch. 438. More recent cases are collected in 1 Jarman, *Wills* (6th ed.) p. 562. But see *Doe v. Glover* (1845) 1 C. B. 448. The rule does not seem to obtain in the Scotch law. Cf. *Barston v. Black* (1868) Scotch & Divorce App. 392.

204. *Williams v. Elliott* (1910) 246 Ill. 548; *Foster v. Smith* (1892) 156 Mass. 378; *Fisher v. Wister* (1893) 154 Pa. St. 65; *Hoxsey v. Hoxsey* (1883) 37 N. J. Eq. 21; *Law v. Douglass* (1899) 107 Iowa 606; *Howard v. Carusi* (1883) 109 U. S. 725; *Mulvane v. Rude* (1896) 146 Ind. 476; *In re Condon's Estate* (Iowa, 1914) 149 N. W. 264.

205. See *contra* to the rule, *Andrews v. Royce* (1860) 12 Rich. 536; *Hubbard v. Rawson* (1855) 4 Gray 242. The rule is condemned in a recent comment on the Iowa cases in 1 Iowa Law Bulletin 87. See also 16 Harvard Law Review 458. In New York, a statute apparently designed to prevent the destruction of contingent remainders has been seized upon to justify a departure from *Jackson v. Robins*. See *Matter of Cager* (1888) 111 N. Y. 343; *Leggett v. Firth* (1892) 132 N. Y. 7; Gray, *Restraints on Alienation* (2d ed.) § 70. A statute of Alabama expressly validates the limitation over except where it may injure creditors or purchasers from the first taker. Alabama Code of 1907, § 3424; *Hood v. Bramlett* (1895) 105 Ala. 660, 17 So. 105.

206. PECKHAM, J., in *Greyston v. Clark* (1886) 41 Hun 125, 130, speaks of it as "a wholly artificial rule, founded neither upon any public policy or sound reasoning." Cf., *Easton v. Straw* (1846) 18 N. H. 320. It is clear that ROY, C., in *Gibson v. Gibson* (1911) 239 Mo. 490, disapproved the rule.

short of legislative action. The rule of *Green v. Sutton* and of *Roth v. Rauschenbusch*, because of the confidence with which so many judges have repeated it, has probably been accepted by the bar and frequently acted upon; but reliance upon this rule has usually taken the form either of refraining from making limitations over following absolute powers of disposal, or of clearly limiting the first taker to a life estate. To this extent, an abandonment of the rule by the courts will cause no inconvenience for it will simply change the practice of lawyers as to future instruments. In the unusual case in which such a limitation over has been made in spite of the rule, the heirs of the first taker may have been advised that they could hold in spite of the limitation over; but with the vacillation in the decisions of the Supreme Court for over thirty years²⁰⁷ on the question as to when the first taker has but a life estate with the limitation over good as a remainder, it is improbable that many lawyers have advised clients who would benefit by the limitation over to acquiesce in the holding by the heirs of the first taker; and this conclusion is borne out by the fact that there has been such a mass of litigation on this subject in recent years. It is submitted that little, if any, inconvenience would be caused in such cases by a judicial abandonment of the rule. Nor would inconvenience be caused to purchasers from the first takers, for after they have benefitted by the powers of disposal the limitations over are necessarily defeated.

A big advantage can be achieved by the courts' abandoning this artificial rule. The mass of litigation on the question of when the first taker has but a life estate would be very greatly reduced,²⁰⁸ and the court would have put itself beyond the temptation to find a life estate to have been created where no intention appears to so limit it—the temptation to which it so plainly yielded in *McMillan v. Farrow*, *Walton v. Drumtra*, and *Under-*

207. Since the decision of *Bean v. Kemmuir* (1885) 86 Mo. 660.

208. See Gray, *Restraints on Alienation* (2d ed.) § 74a. The question would continue to arise with reference to dower and curtesy: if the first taker has but a life estate, his wife has no dower; but if he has a fee, his wife has dower in spite of the limitation over. *Vide infra*, note 101.

wood v. Cave.²⁰⁹ A more positive advantage would be the effectuation of testators' and grantors' intentions whether expressed in the one or the other form, i. e., whether the first taker has a life estate or a fee, and the ridding of our law of a formal and arbitrary rule which serves no good purpose and which, like the rule in *Shelley's Case* and the rule as to indefinite failures of issue, of both of which the legislature has relieved us, only fetters a wholly reasonable and proper disposition of property.

IV SUMMARY

The results of this survey of the present position of executory limitations in Missouri law may be summarized by stating the various types of cases in which the questions have arisen and are likely to arise.

I. A, having an estate of inheritance in Blackacre, devises it

1. To B and his heirs with a proviso that if C is admitted to the bar the land shall go to C and his heirs. C has a valid, contingent, shifting, executory devise.

2. To B and his heirs with a proviso that at the end of twenty years the land shall go to C and his heirs. C has a valid, certain, shifting, executory devise.

3. To B and his heirs from and after ten years after A's death. B has a valid, certain, springing, executory devise.

4. To B and his heirs from and after the date of C's admission to the bar. B has a valid, contingent, springing, executory devise.

5. To B for life (or years) and from and after ten years after B's death to C and his heirs. C has a valid, certain, springing, executory devise.

209. (1903) 176 Mo. 1. Real injury is inflicted by such a misconstruction of gifts in that the spouse of the first taker is deprived of dower or curtesy, and the first taker as a life tenant may be liable for waste.

II. A, having an estate of inheritance in Blackacre, conveys it by bargain and sale, or covenant to stand seised, or a common law method of conveyance to uses,

1. To B and his heirs with a proviso that if C is admitted to the bar the land shall go to C and his heirs. C has a contingent, shifting, executory interest which is *probably* valid in Missouri.

2. To B and his heirs with a proviso that at the end of twenty years the land shall go to C and his heirs. C has a certain, shifting, executory interest, which is *probably* valid in Missouri.

3. To B and his heirs from and after A's death. B has a valid, certain, future interest which will probably be upheld as a remainder, *Dozier v. Toalson*, but which should be treated as a springing, executory interest.

4. To B and his heirs *to take effect* upon A's death. B takes nothing. *Goodale v. Evans*, but *cf.*, *Wimpey v. Ledford*.

5. To B and his heirs from and after C's admission to the bar. B has a valid, contingent, springing, executory interest. *O'Day v. Meadows*.

6. To the heirs of B, a living person. The heirs of B should have a valid, contingent, springing, executory interest; but *quaere*.

7. To B for life (or years) and from and after ten years after B's death to C and his heirs. C has a certain, springing, executory interest which is *probably* valid in Missouri.

III. A, having an estate of inheritance in Blackacre, conveys it by statutory grant or by a method of conveyance good at common law and not operating under the statute of uses. The same results will follow as in II, except for the additional doubt as to the applicability of the statute concerning freeholds *in futuro* to the shifting interests in II, 1 and 2.

IV. A, having a term for years in Blackacre, bequeaths it

1. To B with a proviso that if C is admitted to the bar the term shall go to C and his heirs. C has a valid, contingent, shifting, executory interest. *Manning's Case*.

2. To B with a proviso that at the end of twenty years the term shall go to C and his heirs. C has a valid, certain, shifting, executory interest.

3. To B from and after ten years after A's death. B has a valid, certain, springing, executory interest.

4. To B for life and after his death to C and his heirs. B takes the whole term subject to C's valid, certain, shifting, executory interest.

5. To B for life and from and after ten years after his death to C and his heirs. B takes the whole term which his administrator may hold until ten years after B's death when it will shift to C and his heirs.

V. A, having a term for years in Blackacre, assigns it

1. To B with a proviso that if C is admitted to the bar the term shall belong to C and his heirs. *Quaere*.

2. To X in trust for B with a proviso that if C is admitted to the bar in trust for C. C has a valid, contingent, shifting, equitable interest. *Straat v. Uhrig*.

3. To B from and after the death of A. *Quaere*.

4. To X in trust for B after the death of A. B has a valid, certain, springing, equitable interest.

VI. A, having a picture, bequeaths it

1. To B with a proviso that if B dies without issue surviving him it shall belong to C. C takes nothing. *State ex rel. Haines v. Tolson*.

2. To B with a proviso that if C is admitted to the bar it shall belong to C. *Quaere*.

3. To X in trust for B but if C is admitted to the bar in trust for C. C's contingent, shifting, equitable interest is *probably* good.

4. To B for life and then to C. C has a valid remainder. *State ex rel. Farley v. Welsh*.

VII. A, having a picture, transfers it by deed

1. To B with a proviso that if B dies without issue surviving him it shall belong to C. C takes nothing. *Wilson v. Cockrell*.

2. Same as VI, 2.

3. Same as VI, 3.

4. To B for life and then to C. C has a valid remainder.

5. To B from and after next Christmas. B has a springing, executory interest which is *probably* good.

VIII. A, having a cask of wine, bequeaths or transfers it to B. Any gift over is void because the use of the wine will necessarily mean its consumption.

IX. A devises or conveys land, or bequeaths or transfers personal chattels

1. To B for life with power to pass an absolute title by deed or will, and in the event of his failure to exercise the power to C and his heirs. C has a valid remainder which is vested subject to being divested by B's exercise of the power. (There is some danger that C's remainder will be held to be contingent.) *Jecko v. Taussig*.

2. To B and his heirs with a proviso that if B does not seek admission to the bar then the property is to go to C and his heirs. The gift over is not bad by reason of B's power to defeat it by seeking admission to the bar.

3. To B and his heirs with power to pass an absolute title by deed or will and if B remarries (or dies without issue) then to C and his heirs. The limitation over is *probably* not void by reason of the power given to B. *Cf., Gaven v. Allen*.

4. To B with power to pass an absolute title by deed or will and in event of his failure to exercise the power then to C and his heirs. B will *probably* be held to have a life estate and C a vested remainder which may be divested by B's exercise of the power. *Walton v. Drumtra*.

5. To B in fee (or if personalty, absolutely) with power to pass an absolute title by deed or will and in the event

of his failure to exercise the power then to C and his heirs. C takes nothing because of the power given to B. *Roth v. Rauschenbusch*. Cf., *Green v. Sutton*.

X. A, having a term for years, assigns it to X in trust for B who is given a general power to dispose of it absolutely, and in the event of B's failure to exercise the power in trust for C. C has a valid, contingent, shifting, equitable interest. *Straat v. Uhrig*.

MANLEY O. HUDSON

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APRIL, NINETEEN HUNDRED AND SIXTEEN

NOTES ON RECENT MISSOURI CASES

COURTS—EFFECT OF RULES OF COURT. *Hermann Savings Bank v. Kropp*¹—The appellant who had duly filed a "short form" transcript failed to file an abstract of the record as required by rule eleven of the Supreme Court made under the express authority of a statute.² The penalty fixed by the court in rule sixteen for non-compliance with this rule is dismissal of the appeal or continuance of the case at the option of the respondent; but the respondent in this case sought an affirmance of the judgment to avoid the possible release of the sureties on the *supersedeas* bonds. The court *en banc* refused to affirm the judgment and dismissed the appeal; this result seems to have been due in some measure to the court's unwillingness to change its rule by construction or by the substitution of a new rule. It was said that a rule "made in aid of, and under direct authority of a solemn statute has practically the binding force and effect of a statute," and the court added, "If we are to change it, we ought to change its substance and not nullify it by an indirect collateral attack."

1. (1915) 181 S. W. 86.
2. Revised Statutes 1909, § 2048.

The result of this decision seems to accord with the established practice of the appellate courts of the state and the case is noted here only because of the announced attitude of the court *en banc* toward its own rules. Does a rule of court ever present itself to the court which promulgates it with the binding effect of a statute? Upon the answer to this question may depend to some extent the desirability of conferring on the Supreme Court the power to promulgate a code of procedure and practice. In commending this reform to the Missouri Bar Association in 1913, a special committee on judicial administration and legal procedure expressed the "belief that the rules made by the court itself to facilitate the decision of a case upon its merits will be construed accordingly and not as a legislative enactment, which because it is a legislative enactment must be enforced according to its literal terms, even tho justice fails and the heavens fall."³ Perhaps this expression was too sanguine in view of the quotation in the preceding paragraph. The attitude of the court toward past and present rules may be made the basis of a forecast of its attitude toward rules of practice under the proposed enlargement of its powers.

A study of the decisions of the Missouri appellate courts seems to indicate that the expression in the principal case is in line with the attitude of those courts in the past. In *Harding v. Bedoll*⁴ where the respondent urged the insufficiency of the appellant's abstract, the court declared that its rules "apply to all persons, all cases and all representatives, alike, and must be construed in one case just as they have been or will be in another, irrespective of the case, the parties or their counsel." This statement was quoted with approval in *Kolokas v. Missouri Pacific Ry. Co.*,⁵ where it was asserted that rules of practice must either be abrogated altogether or obeyed as interpreted. In *Hayes v. Foos*⁶ it was held that a rule requiring an exception to the overruling of a motion to be shown in the appellant's abstract was established for the purpose of facilitating the business of the court and that an absence of such showing would be considered by the court tho not raised by the opposing counsel. It may be conceded that parties should not be allowed to waive compliance with such rules; the conclusion seems equally irresistible that neither should they be allowed to insist upon their observance. In *Crothers v. Laforce*,⁷ the appellant having failed to file an abstract as required by rule pleaded his ignorance of the rule as an excuse and asked for a continuance in order that the abstract might be prepared. The court's reply was flat and uncompromising: "We must either live up to our rules or aban-

3. 1913 Proceedings of Missouri Bar Association, p. 127.

4. (1906) 202 Mo. 625, 100 S. W. 638.

5. (1909) 223 Mo. 455, 122 S. W. 1082.

6. (1909) 223 Mo. 421, 122 S. W. 1038.

7. (1911) 241 Mo. 365, 145 S. W. 99.

don them. This rule is essential to the prompt and proper disposition of cases in this court. It is a lawyer's duty to know and conform to the rules. . . . We dislike to dispose of a case without looking into the merits but justice to litigants and lawyers who properly prepare their cases requires us to enforce the rules. This cause is reached for decision in its regular course. The respondent is entitled to have it decided and stands on the rules."

Where the rules of trial courts are involved the courts have assumed a more liberal attitude, refusing to review the discretion of the lower court. In *Kuh v. Garvin*,⁸ where the trial court had allowed an amended interplea to be filed after the time fixed by rule, the court said that "courts have control of their own rules and it rests very much in their discretion as to whether they shall be rigidly enforced or not. We are not prepared to say that such discretion was abused or unreasonably exercised in this case."

The reports of other American jurisdictions are replete with judicial assertions of the binding character of a rule of court. In *Magnuson v. Billings*,⁹ speaking of a rule fixing a stage beyond which pleadings might not be filed, the court said that "a rule of court is a law of practice, extended alike to all litigants who come within its purview, and who in conducting their cases, have the right to assume that it will be uniformly enforced by the court in conservation of their rights as well as to secure the prompt and orderly dispatch of business." Numerous cases may be cited to the same effect.¹⁰ However, there are to be found some cases which refuse to regard rules of court in such a light. In *Mitchell v. Rushing*,¹¹ the court conceded that the appellant's brief violated most of the rules adopted for guidance in the preparation of cases for appeal yet since "to refuse to consider the assignments in this case because of the failure to comply with those rules would result in the miscarriage of justice," it refused to sustain the appellees' objection. And on rehearing it added, "We understand that the rules which it is claimed were violated in presenting the assignments on this appeal were adopted for the convenience of the appellate courts, to aid in the rapid and orderly dispatch of business and are directory only." In *M. K. & T. Ry. Co. v. Kidd*,¹²

8. (1894) 125 Mo. 546. Cf. *Rigden v. Ferguson* (1902) 172 Mo. 49, 72 S. W. 504.

9. (1899) 152 Ind. 177, 52 N. E. 802.

10. *Hayden v. Superior Court* (1913) 22 Cal. App. 23, 133 Pac. 26; *Morae v. Preston* (1907) 54 Fla. 188, 44 So. 711; *Royal Neighbors v. Simon* (1907) 135 Ill. App. 509; *Price v. Swarts* (1912) 49 Ind. App. 627, 97 N. E. 938; *Webster v. Bligh* (1912) 50 Ind. App. 56, 98 N. E. 73; *State ex rel. Connors v. Foster* (1907) 36 Mont. 278, 92 Pac. 761; *Beco v. Tonopah Extension Mining Co.* (Nev., 1914) 141 Pac. 453; *Hendry v. Cartwright* (1907) 14 N. M. 72, 80 Pac. 309; *Carpenter v. Pirner* (1907) 107 N. Y. S. 875; *Cohen v. Cohen* (1914) 145 N. Y. S. 652; *St. Germain v. Bouchard* (1913) 38 R. I. 35, 88 Atl. 802; *Rio Grande etc. v. Gildersleeve* (1899) 174 U. S. 603. See 75 Cent. L. J. 384.

11. (1909) 55 Tex. Civ. App. 281, 118 S. W. 582. Cf. *Childress v. Robinson* (1913) 161 S. W. 78, decided by the same court.

12. (1906) 146 Fed. 499.

the court declared that when rules designed to facilitate the proper discharge of the court's duties are disregarded, it is discretionary with the court whether it will enforce the prescribed penalty.¹³

It would seem that neither practical nor theoretical considerations compel the conclusion that a rule of court has the binding effect of a statute. Where the court promulgates a rule solely to facilitate the transaction of its business, the court only should be in a position to insist upon its observance, the matter lying wholly within its discretion. And even where the rule is one that affects the substantive rights of the parties, the court should not refuse to suspend it in a particular case where the rule works a hardship. In any case rules should in the interests of justice be construed liberally and in accordance with the spirit and purpose with which they were adopted; they do not demand the same literal observance which is due to rules imposed upon courts by the enactment of another body. While in many of the cases cited above the same results would probably be reached on the ground that sufficient reason for a non-observance of the rule had not been shown, the propriety of a flat denial of the court's power to dispense with their observance may well be questioned. It is difficult to see why, as in *Crothers v. Laforce*, a court should feel that the existence of a rule presents the alternative of enforcing it in all cases or of abandoning it altogether. Indeed, the fact that injustice or hardship on a litigant would ensue from the enforcement of the rule indicates that a change is necessary, and a suspension of the rule in a particular case would be tantamount to its amendment so far as it applies to that class of cases. One should not be too hasty in drawing the conclusion that this attitude would be persisted in if the Supreme Court were given greater power to control procedure by rules; it is not unreasonable to expect that the spirit of the suggested reform will work a change in the spirit of judicial construction as well. The whole reform movement is a revolt against the too thoro mechanization of procedure; flexibility is the keynote and flexibility can be attained only by reposing discretion in those who administer justice. Unless courts view their rules in the light of these principles, a great advantage of conferring upon them power to regulate procedure will have been lost.¹⁴

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13. See also *Continental etc. Association v. Woolf* (1909) 11 Cal. App. 677, 106 Pac. 107 (reasonable discretion should be exercised by appellate courts in applying rules); *Indiana Union Traction Co. v. Heller* (1900) 44 Ind. App. 385, 89 N. E. 419 (appellate rules to receive liberal construction); *Sanborn v. Boston & Maine R. R.* (1911) 78 N. H. 65, 79 Atl. 642 (trial judge may suspend rule of superior court); *Schultze v. Huttlinger* (1912) 135 N. Y. S. 80 (rules not to be given a strained and technical construction); *Sylvester v. Olson* (1911) 63 Wash. 285, 115 Pac. 175 (observance of rules of trial courts lies within discretion of trial judge); *Burget v. Robinson* (1903) 123 Fed. 262 (rule made for protection of court may be waived when justice requires); *Omaha etc. Co. v. Omaha* (1914) 218 Fed. 848 (court may set aside rule in an exceptional case).

14. See an excellent article by Professor Pound, "Some Principles of Procedural Reform", 4 *Illinois Law Review* 388, 491.

EVIDENCE—DISQUALIFICATION OF WITNESS WHERE ONE PARTY IS DEAD. *Leavea v. Southern Railway Company*.¹—The plaintiff brought an action for damages caused by an assault committed by the watchman of the defendant corporation. The Supreme Court held that the plaintiff was disqualified by the statute² from testifying as to what took place at the time of the assault, because the defendant's servant who committed the assault was dead. The effect of this was to overrule the decision of the Kansas City Court of Appeals in *Drew v. Wabash Railway Co.*,³ of which the Supreme Court expressly disapproved.

The common law disqualification of witnesses because of interest was recognized in the early Missouri decisions.⁴ It was abolished by the statute of 1855 which provided that no witness should be excluded because of interest, but which expressly left a party to the action incompetent.⁵ By the statute of 1865 it was provided that no one should be disqualified as a witness in a civil suit because of his interest as a party, except that, "where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party shall not be admitted to testify in his own favor."⁶ In 1887 the provision that a party to the contract in issue could not testify in favor of anyone claiming under him, was added.⁷ The purpose of this statute was to prevent an undue advantage of the living party over the dead, and to remove the temptation to speak falsely where contradiction is impossible. Professor Wigmore considers such statutes objectionable even tho strictly construed, and instead of disqualifying the living party, he would rather give the other side a chance to be heard by admitting declarations of the deceased party concerning the transaction.⁸ As he has pointed out, the statute is open to the same objections as the interest rule, in that it shuts off entirely one source from which the court may learn the truth. It seems that the other side may be safeguarded by having the credibility of the party judged in the light of his interest, as is done in the case of other interested witnesses.

The Missouri statute kept the common law disqualification of parties in one situation, i.e., where the opposite party is dead, and it really added a new disqualification in that it disqualified a party to the contract in issue tho not a party to the suit and without interest in it. The problems which arise in the application of the statute are due to the difficulty of determining who is a party to the contract or cause of action. Should the agent who made the contract

1. (1915) 181 S. W. 7. (1913) 171 Mo. App. 24.
2. Revised Statutes 1909, § 6354.
3. (1908) 129 Mo. App. 459, 107 S. W. 478.
4. *Rector v. McNair* (1824) 1 Mo. 471; *Levy v. Hawley* (1844) 8 Mo. 510; *Horine v. Horine* (1848) 11 Mo. 649.
5. Revised Statutes 1855, c. 168, p. 1576.
6. General Statutes 1865, p. 586.
7. Laws of 1887, p. 287.
8. Wigmore, Evidence, §§ 576, 578.

and who, with the exception of the opposite party, is the only one who knows exactly what the transaction was, be considered a party? The policy of the Missouri courts has been to so construe the statute as to establish the complete mutuality which they believe was intended.⁹

In *Williams v. Edwards*,¹⁰ it was held that the defendant in an ejectment suit could not testify concerning a transaction with the deceased agent of a corporation, by which he claimed the deed of trust under which the plaintiff claimed was cancelled. The agent was held "the other party to the contract" on the theory that since a corporation can act only thru agents, it is necessary to disqualify anyone from testifying concerning a transaction with an agent the advantage of whose testimony the corporation is deprived of by his death, in order that the corporation may have the same protection that a natural person has. The rule of this case has become well established in later decisions.¹¹ Upon the authority of the corporation cases it has been held that where a contract is made with the agent of an individual, the death of the agent disqualifies the party contracting with him.¹² However, an agent of a party to the suit was a competent witness at common law,¹³ and the Missouri courts have held that an agent of an individual was not disqualified by statute.¹⁴ In *Stanton v. Ryan*¹⁵ it was held that the defendant's wife who made a contract as his agent with the plaintiff's deceased partner, was competent to testify, tho the court suggested that an amendment disqualifying an agent would be desirable. The defendant himself was held incompetent to testify concerning the contract made by the deceased partner for the partnership.¹⁶ In *Clark v. Thias*,¹⁷ one of the later cases decided by the Supreme Court, the plaintiff sued upon a note which his clerk had taken from the defendant's testatrix and it was con-

9. *Donnell Newspaper Co. v. Jung* (1899) 81 Mo. App. 577; *Banking House v. Rood* (1896) 132 Mo. 256, 33 S. W. 816; *Scott v. Burfield* (1906) 116 Mo. App. 71, 87 S. W. 610; *Columbia Brewery Co. v. Rohling* 1908) 133 Mo. App. 65, 112 S. W. 767.

10. (1887) 94 Mo. 447, 7 S. W. 429.

11. *Banking House v. Rood* (1896) 132 Mo. 256, 33 S. W. 816; *Sidway v. Missouri Land & Live Stock Co.* (1901) 163 Mo. 342, 63 S. W. 705; *Central Bank v. Thayer* (1904) 184 Mo. 61, 82 S. W. 142; *Charles Green Real Estate Co. v. Building Co.* (1906) 196 Mo. 358, 93 S. W. 1111; *Nichols, Shepard & Co. v. Jones* (1888) 32 Mo. App. 657; *McCormick Harvesting Machine Co. v. Heath* (1896) 65 Mo. App. 461; *Nelson v. K. C. Ft. S. & S. Ry. Co.* (1896) 66 Mo. App. 647; *Columbia Brewery Co. v. Menke* (1908) 133 Mo. App. 65, 112 S. W. 767.

12. *Robertson v. Reed* (1889) 38 Mo. App. 32; *Holmann v. Lange* (1898) 143 Mo. 100, 44 S. W. 752; *Wendover v. Baker* (1894) 121 Mo. 273, 25 S. W. 918; *Bone v. Friday* (1914) 180 Mo. App. 575, 167 S. W. 690.

13. Greenleaf, Evidence (16th ed.) § 416.

14. *Stanton v. Ryan* (1887) 41 Mo. 510; *Baer v. Pfaff* (1891) 44 Mo. App. 35; *Leahy v. Simpson* (1894) 60 Mo. App. 83; *Clark v. Thias* (1903) 173 Mo. 628, 73 S. W. 616; *Jackson v. Smith* (1909) 139 Mo. App. 691, 123 S. W. 1026; *Dawson v. Wombles* (1904) 104 Mo. App. 272, 78 S. W. 823.

15. (1887) 41 Mo. 510.

16. See *McClelland v. McClelland* (1890) 42 Mo. App. 32; *Donnell Newspaper Co. v. Jung* (1899) 81 Mo. App. 577.

17. (1903) 173 Mo. 628, 73 S. W. 616.

tended that the clerk was incompetent to testify concerning the transaction. The court said that since he was not expressly disqualified by the statute, the test was whether or not he would have been competent at common law, and it held that the clerk would have been competent for he was not a party and had no interest in the suit; so, since the statute was intended only to modify the common law to permit a party with interest to testify in his own behalf where the other party to the contract or cause of action on trial is alive, the plaintiff's clerk was not disqualified by it.

However, the doctrine of *Stanton v. Ryan* and *Clark v. Thias* is discredited by recent cases in which the rule is laid down that the term "party to the contract" is to be construed to mean the person who negotiated it rather than the person in whose name and interest it was made, and by this rule the agent is disqualified where the party he contracted with is dead.¹⁸ The cases disapproving of *Clark v. Thias* do so on the ground that the witness was there held competent solely on the ground that he had no interest in the suit. It is pointed out in these cases that *Weiermueller v. Scullin*¹⁹ overruled on that same question the case of *Curd v. Brown*²⁰ which held that the death of one party left the other in the same position as a witness at common law—incompetent if interested. The true rule was there laid down to be that the death of the opposite party and not interest was the thing which disqualified the survivor.

In *Carroll v. United Railways Co.*,²¹ in which the agent of an individual contracted with the deceased agent of the corporation, it was held that the agent of the individual was disqualified from testifying concerning the transaction. In *Taylor v. George*,²² it was held that an agent of an individual who made a contract with the deceased party was incompetent. These cases consider *Griffin v. Nicholas*²³ which did not raise the question of an agent's competency, as contra to *Clark v. Thias* because it was said that the spirit of the statute as well as its letter was to be carefully looked to in interpreting it. In *Diggs v. Henson*²⁴ the defendant's testator sold land to an agent of the plaintiff. The plaintiff brought an action for breach of covenant of warranty and it was held that the agent was incompetent to testify concerning the transaction with the deceased. However, it was not shown whether the deceased knew he was dealing with an agent, so that the case

18. *Edwards v. Warner* (1900) 84 Mo. App. 200; *Donnell Newspaper Co. v. Jung* (1899) 81 Mo. App. 577; *Green v. Ditsch* (1898) 143 Mo. 1, 44 S. W. 790; *Carroll v. United Railways Co.* (1911) 157 Mo. App. 249, 137 S. W. 303; *Taylor v. George* (1913) 176 Mo. App. 215, 161 S. W. 1187; *Diggs v. Henson* (1914) 181 Mo. App. 34, 163 S. W. 565.

19. (1907) 203 Mo. 466, 101 S. W. 1088.

20. (1899) 148 Mo. 82, 49 S. W. 990.

21. (1911) 157 Mo. App. 249, 137 S. W. 303.

22. (1913) 176 Mo. App. 215, 161 S. W. 1182.

23. (1909) 224 Mo. 275, 123 S. W. 1063.

24. (1914) 181 Mo. App. 34, 163 S. W. 565.

might have been one of undisclosed principal. If so, it might have been held on that ground that the agent was a party to the contract and therefore disqualified.

In *Drew v. Wabash Railway Co.*,²⁵ the plaintiff who had been forcibly ejected from a train by the defendant's conductor since deceased, was held competent to testify as to what took place. The court recognized the rule of *Williams v. Edwards*, but held that it did not apply to actions *ex delicto* arising from the wrongful acts of an agent of a corporation. But in *Darks v. Scudder-Gale Grocer Co.*,²⁶ where the plaintiff sued for the wrongful death of her husband who had been poisoned by medicines bought from a deceased agent of the defendant corporation by the partnership of which he was a member, it was held a living partner was competent to testify. The court disapproved the distinction made in *Drew v. Wabash Railway Co.*, tho its decision was put on the ground that the partner had no interest in the suit. The result of the principal case was not therefore impelled by the decision in *Darks v. Scudder-Gale Grocer Co.*

It is submitted that the cases disqualifying agents involved a big extension of the statute, and that *Leavea v. Southern Railway Co.* marks its further extension. The terms of the statute do not necessitate its application to actions *ex delicto* except as to actual parties to the action. The result of applying it to agents of parties may be to discourage compromise, for a person injured on a railroad should now hasten to file suit and have a trial of the case if plenty of testimony is not available, in order to avoid his own disqualification as a witness. For this reason, and because the decision unnecessarily extends a statute which in itself is of doubtful wisdom, it is deemed unfortunate that *Drew v. Wabash Railway Co.* was not adhered to by the Supreme Court.

LAURANCE M. HYDE

GUARANTY—SUIT AGAINST MAKER AND GUARANTOR JOINTLY. *Roark v. Ideal Epworth Acetylene Co.*¹—In this case the plaintiff brought suit against an obligor and a guarantor jointly, the latter having been the original obligee and having assigned the contract obligation to the plaintiff and guaranteed its payment. The Kansas City Court of Appeals held that an obligor and guarantor may thus be sued jointly.

At common law so entirely distinct and independent was the contract of the guarantor of a note from that of the maker that they could be sued only separately.² The first statute, which was almost

25. (1900) 129 Mo. App. 450, 107 S. W. 478.

26. (1910) 146 Mo. App. 246, 130 S. W. 430.

1. (Mo., 1915) 175 S. W. 84.

2. *Maddox v. Duncan* (1898) 143 Mo. 618, 619; *Hill v. Combs* (1901) 92 Mo. App. 242, 253.

indentical with the present statute, was passed in 1849³ and in 1865⁴ was amended to its present form which is as follows: "Every person who shall have a cause of action against several persons, including parties to bills of exchange and promissory notes and . . . be entitled by law to one satisfaction therefor, may bring suit thereon jointly against all or as many of the persons liable as he may think proper."⁵ By virtue of this statute it was early held in *Holland v. Hunton*⁶ that the maker and indorser of a promissory note could be jointly sued, and this result was later approved *obiter* in *Meis v. Geyer*.⁷ But in the famous case of *Graham v. Ringo*,⁸ the Supreme Court held, in accord with a previous *dictum*⁹ and without reference to the above statute, that the maker and guarantor of a promissory note could not be sued jointly. The following year the St. Louis Court of Appeals in a memorandum opinion¹⁰ reached the same result, tho it had just held in another memorandum opinion that the maker and indorser of a note may be sued jointly before a justice.¹¹ Soon afterward the Supreme Court in *Parmerlee v. Williams*,¹² again without reference to the statute, followed *Graham v. Ringo*, and both cases were approved in a *dictum* in *Prior v. Kiso*¹³ three years later.

In the leading case of *Maddox v. Duncan*,¹⁴ the defendant had assigned a note in the following manner: "Waiving notice and protest and demand, I assign the within note to Samuel Grant for value received and I guarantee the payment of it." When sued in one count as indorser and in another as indorser and maker the defendant pleaded the ten year statute of limitations. The Supreme Court held that the defendant was an indorser and not a guarantor and that payments on the note by the maker did not arrest the running of the statute of limitations as to the indorser; it was said *obiter* that while at common law the defendant and the maker could not be sued jointly, yet they could be joined under the statute.¹⁵ The court did not purport to overrule *Graham v. Ringo*, nor are the cases necessarily inconsistent for *Graham v. Ringo* dealt with maker and guarantor; the *dictum* in *Maddox v. Duncan* dealt with maker and indorser. It has been doubted in later cases whether these remarks in *Maddox v. Duncan* were really *obiter*,¹⁶ but it seems clear that they were not necessary to the decision of the case; the indorser was the only one be-

3. Laws of 1849, p. 76, § 8.

4. General Statutes 1865, p. 651, § 6.

5. Revised Statutes 1909, § 1784.

6. (1852) 15 Mo. 475.

7. (1877) 4 Mo. App. 404.

8. (1878) 67 Mo. 324.

9. *Central Savings Bank v. Shine* (1871) 48 Mo. 456, 464.

10. *Greely v. Cohen* (1879) 7 Mo. App. 596.

11. *Deshon v. Leffler* (1879) 7 Mo. App. 595.

12. (1880) 71 Mo. 410.

13. (1883) 81 Mo. 241, 249.

14. (1898) 143 Mo. 613.

15. Revised Statutes 1899, § 1995.

16. *Write-Away Pen Co. v. Buckner* (Mo. 1915) 175 S. W. 81.

ing sued and the only justification for this reference to the joinder was to point out that even admitting the maker and indorser could by the statute be sued jointly, yet the statutory remedy would not change the indorser to a joint maker or co-obligor so as to make the statute of limitations the same for the indorser as for the maker.

In *Hill v. Combs*,¹⁷ the Kansas City Court of Appeals held that several guarantors who signed on the back of a promissory note at different times could be sued jointly under the statute. The court said *obiter*, in reference to the effect of *Maddox v. Duncan* on the prior decision of *Graham v. Ringo*; "We take it from the language employed in the above excerpt [from *Maddox v. Duncan*] that the court meant to decide and did decide that the maker and guarantor of a promissory note may be sued thereon jointly. But it may be that we are in error in supposing the case has gone to this extent, but whether this is the one way or the other is perhaps unimportant in the present case." As pointed out above, what was said in *Maddox v. Duncan* was *dictum* and when the Supreme Court said the effect of the statute would probably be that the defendant and the maker could be sued jointly it had previously decided that the defendant was an indorser, not a guarantor, so that even assuming the *dictum* was right (in accord with *Holland v. Hunton*¹⁸ and *Meis v. Geyer*,¹⁹) still it is not authority for saying that the maker and the guarantor can be sued jointly. Perhaps the obligations of the indorser and guarantor are not so fundamentally different as to warrant a distinction as to joinder. The statute in providing for joinder where one has a cause of action against several persons and is entitled to one satisfaction, may be broad enough to allow the maker and guarantor to be jointly sued, but the Supreme Court has not yet overruled *Graham v. Ringo* and *Parmerlee v. Williams*. The clause, "including parties to bills of exchange and promissory notes," may be broad enough to allow the maker and indorser to be joined, and still not warrant the joinder of the maker and guarantor. By the weight of authority an indorser is a party to the bill of exchange or note.²⁰ His "indorsement must, as a general rule, be somewhere on the paper itself or attached thereto, and unless it is the party cannot be held liable as an indorser."²¹ But the contract of guaranty may be contained in a separate instrument, and even if written on the note itself, the action against the guarantor is not on the note but upon his separate contract of guaranty. However, in *Hill v. Coombs*,²² the Kansas City Court of Appeals decided that when two

17. (1901) 92 Mo. App. 242.

18. (1852) 15 Mo. 475.

19. (1877) 4 Mo. App. 404.

20. 33 L. R. A. (N. S.) 175 note.

21. 1 Daniels, Negotiable Instruments (6th ed.) 765.

22. (1902) 93 Mo. App. 264.

persons sign their names on the back of a note for the purpose of allowing the payee to raise money thereon they are guarantors and jointly liable; and on the authority of *Maddox v. Duncan* the court said *obiter* that they could be sued jointly with the payee who indorsed.

In *Taney County Bank v. Bray*,²³ the Springfield Court of Appeals held that the payee of a note who indorses it thus, "For value received I hereby guarantee payment of the within note, and waive demand and notice of protest on same when due," was a guarantor and could be sued jointly with the maker. But the Supreme Court in *Maddox v. Duncan* had previously held that such an assignment was an indorsement, not a guaranty; and the result of *Taney County Bank v. Bray* may be explained on the authority of *Holland v. Hunton* in which the Supreme Court had held that an indorser and a maker could be sued jointly. It is submitted that the Springfield Court's decision is therefore no authority for allowing a joint suit against a guarantor and a maker.

The St. Louis Court of Appeals has recently held in *London v. Funsch*²⁴ that where the lessee of property and a third person entered into a joint contract by which they agreed to pay and guaranteed the payment of rent, they could be sued jointly whether sureties or guarantors. In a *dictum* the court said that "it is settled law that a guarantor is neither an indorser nor a surety; that his undertaking in his own separate and independent contract, is not a joint engagement with his principal and he cannot be sued with him," citing *Graham v. Ringo*.

In *State ex rel. Jackson v. Bradley*,²⁵ the Supreme Court having before it a question of *jurisdiction*, refused to say that *Maddox v. Duncan* had overruled *Graham v. Ringo* as to the point of joinder, but did assert that the decision in *Graham v. Ringo* as to jurisdiction was still sound. The Kansas City Court of Appeals in *Write-Away Pen Co. v. Buckner*²⁶ felt itself "justified in attaching some significance" to the fact that the Supreme Court had thus approved *Graham v. Ringo* only on the point of jurisdiction, and concluding that what was said in *Maddox v. Duncan* concerning *Graham v. Ringo* was not *dictum*, held that the maker and indorser of a promissory note could be sued jointly. The result reached cannot be questioned, being in accord with the Supreme Court's decisions,²⁷ but it was not necessary to conclude that *Graham v. Ringo* had been overruled in order to reach that result.

23. (1910) 141 Mo. App. 692, 125 S. W. 235.

24. (Mo., 1915) 173 S. W. 88.

25. (1908) 193 Mo. 33.

26. (Mo., 1915) 175 S. W. 81.

27. *Holland v. Hunton* (1852) 15 Mo. 475.

Before the decision of *Roark v. Ideal Epworth Acetylene Co.*²⁸ the situation was as follows: it was settled that the maker and indorser of a promissory note could be joined under the statute; the Springfield Court of Appeals, had held that the maker and guarantor could be joined, but its opinion that one defendant was a guarantor was not in accord with the Supreme Court's decision in *Maddox v. Duncan* so that its decision must be put upon the ground that the suit was against an indorser and a maker; the Kansas City court in a *dictum* had reached the conclusion that the maker and the guarantor could be joined; the Supreme Court and the St. Louis Court of Appeals in early decisions had held that the maker and guarantor could not be joined, and a recent *dictum* of the latter court had expressly approved that result. In *Roark v. Ideal Epworth Acetylene Co.*, it was held that a company which "had sold and assigned its demand . . . and had guaranteed the payment" was a guarantor and could be sued jointly with the maker. It is to be noted that in *Maddox v. Duncan* a similar assignment and guarantee of a promissory note was decided by the Supreme Court to be an indorsement rather than a guaranty. The instrument in the present case, altho it is not given in *haec verba*, was probably not a promissory note but a bill of sale, and as such it could not technically be indorsed. Assuming that the question of joinder of obligor and guarantor is squarely raised, the court was compelled to determine whether *Graham v. Ringo* had been overruled by a later decision of the Supreme Court. The Kansas City court frankly admits that "there is room for a reasonable and serious difference of opinion." It concluded that *Maddox v. Duncan* had overruled *Graham v. Ringo*, but this seems to have been due to a misconception of those cases. The foregoing analysis has shown that *Graham v. Ringo* has not been modified by the Supreme Court, and that the confusion in the opinions of the courts of appeals is due to a failure to distinguish between a suit against maker and indorser and a suit against maker and guarantor. It is submitted that *Graham v. Ringo* is not to be abandoned because it was decided without reference to the statute, and that the decision in *Roark v. Ideal Epworth Acetylene Co.* fails to follow the latest controlling decision of the Supreme Court, the effect of which was correctly stated by the St. Louis Court of Appeals in *London v. Funsch*.

JAMES P. HANNIGAN

INFANTS—RATIFICATION OF CONTRACTS UNDER THE STATUTE. *Moser v. Renner*¹—The plaintiff while an infant bought a drug store from the defendant, paid part of the purchase price and gave his promissory notes for the remainder. Immediately on attaining majority the

28. (Mo., 1915) 175 S. W. 84.

1. (Mo., 1915) 179 S. W. 970.

plaintiff notified the defendant that he elected to rescind the sale. The defendant refused to surrender the notes or to repay the purchase money, tho the plaintiff offered to return the drug store with its stock. Thirty days later the plaintiff brought this action seeking cancellation of the notes and judgment for the amount of the purchase money paid; during these thirty days the plaintiff had kept the store and had sold no goods, tho after the suit was filed he sold bandages of the value of five dollars. The court gave the relief sought and held that there had been no affirmance by the infant. The court seems to have been of the opinion that a ratification by the infant would be effectual only if accomplished by one of the methods enumerated in the statute.

The common law principles as to the ratification of an infant's contracts prevailed in Missouri until 1879, when it was enacted that "no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged thereby."² This statute was expressly repealed in 1895 and superseded by the present statute which provides that "no action shall be maintained whereby to charge any person or any debt contracted during infancy, unless such person shall have ratified the same by some other act than a verbal promise to pay the same; and the following acts on the part of such person after he becomes of full age shall constitute a ratification of such debt: first, an acknowledgment of or promise to pay such a debt made in writing; second, a partial payment upon such debt; third, a disposal of part or all of the property for which such debt was contracted; fourth, a refusal to deliver property in his possession or under his control for which such debt was contracted, to the person to whom the debt is due, on demand thereof made in writing."³

The common law made a distinction between ratification of an executory contract and ratification of an executed contract. An affirmance of an executory contract could be made by the late infant only by an express or implied promise to perform,⁴ made with a knowledge of the facts and with a deliberate purpose of assuming liability.⁵ But of an executed contract a mere acknowledgment or act indicating an intention to be bound by the contract was a ratification;⁶ thus, a disposal by the late infant of the goods which were the con-

2. Revised Statutes 1879, § 2516.

3. Laws of 1895, p. 181, Revised Statutes 1909, § 2786.

4. *Reed v. Boshears* (1856) 36 Tenn. 118; 2 Greenleaf, Evidence (10th ed.) § 367.

5. *Baker v. Kennett* (1873) 54 Mo. 82.

6. *Hugh v. Carondelet* (1874) 56 Mo. 202.

sideration of the executed contract was a ratification of it.⁷ Acceptance of a part of the purchase price after reaching majority was such a ratification of a deed as to prevent later disaffirmance.⁸

It is obvious that the Act of 1879 was not merely declaratory of the common law on the subject of ratification of infant's contracts. As the act is exclusive in its terms, an action to charge the late infant on his debts, promises and contracts made during infancy can be maintained only if there has been ratification by the statutory method. The statute seems to refer only to promises and contracts executory on the part of the infant, for the words are that "no action shall be maintained whereby to charge" a person on a debt, promise or contract made during infancy. Hence it is doubtful whether the act has any application to executed contracts, *i. e.*, to contracts fully performed on the part of the infant. Therefore the common law still prevailed as to ratification of the executed contracts, and ratification by a common law method ought still to bar disaffirmance. Moreover, it would seem that an adult might still ratify his debts and executory contracts entered into during infancy in a way not provided by statute so as to bar his later disaffirmance, altho it would not render him liable in a suit on the debt. If an infant buys a horse and pays part of the purchase price, and after attaining majority orally promises to pay the rest of the purchase money, this would not render him liable in an action for the balance of the purchase money; but should the infant seek to disaffirm this contract and sue to recover the purchase price paid for the horse during infancy, the defendant ought to be allowed to plead this oral promise as a bar to the plaintiff's action. Such a result is not inconsistent with the words or intent of the statute. There appears, however, to be no case on the point.

The statute of 1878 was expressly repealed in 1895 and superseded by the present statute which introduced new methods of ratification not recognized at common law or under the earlier statute. A written acknowledgment will render the late infant liable for his debts tho it would not at common law, and probably would not under the preceding statute. Part payment is also a ratification under the later statute so as to charge the late infant for the rest of the debt, tho it would not have been a ratification at common law⁹; but for part payment to amount to a ratification it must be voluntary and on a debt which the payor at the time recognizes as a subsisting debt against him.¹⁰ Ratification by disposal of the property for which the debt was contracted was recognized at common law; disposal is not effected by user, but

7. *Chestre v. Barrett* (1827) 4 McCord (S. C.) 241; *Lynde v. Budd* (1880) 2 Paige (N. Y.) 191; *Williams v. Mabce* (1849) 7 N. J. Eq. 500.

8. *Higley v. Barron* (1871) 49 Mo. 103.

9. *Whitney v. Dutch* (1817) 14 Miss. 457; *Hurely v. Margarits* (1846) 8 Pa. State 428; *Catlin v. Haddow* (1882) 49 Conn. 492; *Rapid Transit Land Co. v. Sandford* (Tex. Civ. App., 1898) 24 S. W. 587.

10. *Snyder v. Gerliche* (1908) 101 Mo. App. 647, 74 S. W. 377.

connotes alienation as by sale, gift or devise.¹¹ The final method of ratification under the statute of 1895 was not recognized under the earlier act or known to common law; the effect of it is that a mere refusal to disaffirm, *i. e.*, a refusal to deliver the property for which the debt was contracted to the vendor on demand made in writing, amounts to a ratification. So immediately after the infant attains majority, the vendor can force the issue and compel him either to disaffirm by delivering the property to him or to affirm by refusing so to do.

There are, however, at least two classes of cases in which an adult is probably liable for debts contracted during infancy without proof of any ratification by the statutory method. In *Hortsmeyer v. Connors*¹² the plaintiff alleged that the defendant while an infant requested him to pay certain taxes assessed against the defendant's land. The plaintiff did so and brought suit against the defendant for that amount after the infant became of age. It was held that the plaintiff had stated a good cause of action, altho he had alleged no facts showing that the infant had affirmed his promise by the method provided under the Act of 1879. There appears to be no case squarely deciding that an infant partner must on reaching majority affirm the partnership debts by the statutory method before his share in such property will be liable on execution for the partnership debts, but there is a strong *dictum* in *Hill v. Bell*¹³ to the effect that an adult partner has a right to insist upon the assets of the firm being applied to the firm's debts and that the infant's right to rescind is "subject to this equity." No mention was made of need to affirm by the statutory method.

The statute of 1895 was less extensive than the statute of 1879 in that the later act referred only to debts contracted during infancy, whereas the earlier one referred in addition to promises and simple contracts made during infancy. Since the earlier act abrogated the common law with regard to a ratification of infant's contracts, debts and promises so as to render the infant liable in a suit thereon, it becomes important to determine to what extent, if any, the common law was restored by the repeal of the first act and the enactment of the second. A statute provides that "when a law repealing a former law, clause or provision is itself repealed, such law, * * * shall not be revived unless it be otherwise expressly provided."¹⁴ This has been construed in *dicta* in two cases to mean that the repeal of a statute which abrogates the common law does not revive the common law.¹⁵ But the court in *Koerner v. Wilkinson*¹⁶ admitted *obiter* that the simple repeal of a statute abrogating the common law restores the

11. *Koerner v. Wilkinson* (1902) 96 Mo. App. 510, 70 S. W. 509.

12. (1893) 56 Mo. App. 115.

13. (1892) 111 Mo. 35, 19 S. W. 959.

14. Revised Statutes 1909, § 8060.

15. *State v. Slaughter* (1879) 20 Mo. 484, 487; *Hindman v. Springfield* (1899) 80 Mo. App. 581, 583.

16. (1902) 96 Mo. App. 510, 70 S. W. 509.

common law. This view is in accord with decisions in other jurisdictions,¹⁷ and it would seem to be the sound view that if the statute of 1879 had been simply repealed, the common law would have been restored. But the court in *Koerner v. Wilkinson* further says that since the statute of 1879 was not simply repealed but was superseded by another act on the same subject, the common law was not revived except to the extent of its reenactment in the later statute. This would lead to a strange result. The earlier statute referred to debts, promises and simple contracts made during infancy; whereas the later one referred only to debts contracted during minority, and did not extend to promises and contracts which do not give rise to a debt. So if by the repeal of the first act and by the enactment of the second, the common law was not revived to the extent that it was not inconsistent with the second act, there would be neither common law nor statutory law on the subject of affirmance of promises and simple contracts made during minority which did not charge the infant with a debt. It would mean that an adult could by no act, word or writing ratify a contract or promise made during infancy which did not give rise to a debt, and that he could never be sued on such a promise or contract.

Assuming, then, that the common law was restored to the extent that it was not inconsistent with the statute of 1895, a promise or a simple contract which is still executory and which does not give rise to a debt may be ratified by methods recognized at common law. Such a result would not be inconsistent with the terms or intent of the statute. Thus, if an infant continues under a contract of service after he becomes of age without demanding increased wages, it is evidence of his affirmance of the contract.¹⁸

The statute of 1895 is similar to the statute of 1879 in that it has to do only with a ratification which will charge the late infant when sued on his debts. Hence under the later statute, just as under the earlier one, the infant should be allowed to ratify by a common law method his executory contracts which do give rise to debts so as to bar his later disaffirmance, altho such ratification would not render him liable in a suit on the debt. He can also under this statute ratify his executed contracts by a common law method so as to bar his later disaffirmance.

The court in *Moser v. Renner* seems to have been of the opinion that a ratification by the late infant would be effectual only if accomplished by one of the methods enumerated in the statute. This case,

17. *State v. Rollins* (1837) 6 N. H. 550; *Booth v. Commonwealth* (1861) 16 Grattan (Va.) 519; *Insurance Co. Valley of Virginia v. Barley* (1863) 16 Grattan (Va.) 519. These two Virginia cases were decided under a statute similar to § 8060. Revised Statutes 1909. *Moseley v. Brown* (1882) 76 Va. 419; See *Mathewson v. Phoenix Iron Foundry* (1884) 20 Fed. 281; *Beaven v. Went* (1895) 155 Ill. 592, 41 N. E. 91; *Baum v. Thomas* (1898) 150 Ind. 378, 50 N. E. 357; *Donaldson v. State* (1903) 167 Ind. 553, 67 N. E. 1029; *Reeves v. Russell* (N. D., 1914) 148 N. W. 654.

18. See *Spicer v. Earl* (1879) 41 Mich. 191.

however, was not one in which the late infant was being sued on a debt contracted during infancy, but one in which the late infant sought to disaffirm the purchase made during infancy which purchase had charged him with a debt. It would seem, therefore, that the infant's ratification ought to have been determined on common law principles, and it is submitted that it was improper to refer its determination to the statute. But the acceptance of this view would not have changed the result of the decision for the prompt disaffirmance was clearly effectual according to common law principles. The court fell into a very natural misapplication of the statute, which seems to have been very inartistically drafted, and which ought to be cleared up by amendment.

GARDNER SMITH

PARENT AND CHILD—DUTY OF FATHER TO SUPPORT CHILD HELD BY MOTHER IN ANOTHER STATE. *Assman v. Assman*.¹—This was an action by a wife who was living apart from her husband to recover the expense of the care, keep and education of their minor son. The wife left the husband, who was apparently not at fault, and later abducted the child and took it to New York without the husband's consent. The father made no effort to regain the custody of the child, but sent his clothes and wrote a letter enjoining him to obey his mother. Later the father met the child on a street in Brooklyn and conversed with him. The St. Louis Court of Appeals denied recovery under these circumstances, being chiefly influenced by the fact that the child had been taken to a distant state where the support was furnished.

In some jurisdictions the parent's obligation to support a minor child is considered to be moral and not legal,² with the consequence that the parent is liable for necessities furnished to the child only where authority has been expressly or impliedly given. But in a majority of American jurisdictions the obligation of the parent is considered to be a legal one, and when the parent omits or neglects to discharge it the law imposes an obligation to pay for necessities furnished by a third person.³ The basis of the parent's liability in such cases is the relationship between the parent and the child and the liability is quasi-contractual. In some states the duty of supporting a child is imposed by statute. It is not clear whether in Missouri the obligation is legal or merely moral. In *Holt v. Baldwin*,⁴ it was held that a father was liable for necessities furnished to the child only in the event that he had given authority for the purchase, either expressly

1. (1915) 179 S. W. 957.

2. *Sheldon v. Springett* (1831) 11, C. B. 462; 17 Halsbury's Laws of England, p. 114; *Kelly v. Davis* (1870) 49 N. H. 187; *Gordon v. Potter* (1848) 17 Vt. 348; *McMillen v. Lee* (1875) 78 Ill. 443; *Freeman v. Robinson* (1876) 38 N. J. Law 383.

3. *Porter v. Powell* (1890) 79 Iowa 151.

4. (1870) 46 Mo. 265.

or impliedly, and the court seems to have been of the opinion that there was no legal duty to provide necessities. *Holt v. Baldwin* seems to have been entirely neglected in later decisions and the courts have since shown a disposition to impose a legal duty on the parent apart from any theory of agency.⁵ In view of the statute making it a criminal offense for a father to fail to support a child⁶ and in view of the fact that there is no general system of public relief in Missouri as there was in England at the time when the common law took root, it would seem entirely proper to enforce the parent's duty as a legal obligation without resort to the theory of agency.

Admitting that the parent has a legal obligation to pay for necessities furnished to the child, there must be some limits on its enforcement. If the child is living with its father it is presumed that necessities are being furnished by him and a "tradesman who credits an infant does it at his peril."⁷ In *Rogers v. Turner*,⁸ a child who was living at home was treated by a physician without his father's consent, and it was held that since the father employed a family physician who would have cared for the child there was no liability upon the father. But in *Martz v. Fulhart*,⁹ the plaintiff supplied necessities to the child who took them to his father's home and there consumed them with the knowledge of the parent, and tho the purchase had not been authorized the parent was held liable. The parent's obligation is not diminished if the minor child is away from home with his consent,¹⁰ but when the child has abandoned the parental roof against the wish of his parent the latter's liability seems to be at an end.¹¹ This can be justified only on the ground that to permit third persons to charge the parents for necessities furnished in such cases would encourage children to live away from their parents' homes. If the father has driven the child away from home thru cruelty or fear he can not avoid his obligation to pay for necessities furnished. In *Huke v. Huke*,¹² a daughter who had been driven from home sought to have future maintenance decreed to her and it was denied because of the lack of a precedent. There would seem to be no good reason why a court should not decree future maintenance if its machinery is adequate for the purpose; protection to the child demands enforcement of the parent's obligation in this manner so as to assure the support of the child. In *Brosius v. Barker*,¹³ it was held that a father was under no legal obligation to support his

5. *St. Ferdinand Loretta Academy v. Bobb* (1873) 52 Mo. 357; *Industrial Home v. Fritchey* (1881) 10 Mo. App. 344; *Brosius v. Barker* (1911) 154 Mo. App. 657, 136 S. W. 18. Cf. *Huke v. Huke* (1891) 44 Mo. App. 308.

6. Revised Statutes 1909, § 4492; *State v. Thornton* (1901) 232 Mo. 288.

7. *Perrin v. Wilson* (1849) 10 Mo. 451; *Van Valinburgh v. Watson* (1816) 13 Johnston (N. Y.) 480.

8. (1875) 59 Mo. 116.

9. *Martz v. Fulhart* (1910) 142 Mo. App. 348, 126 S. W. 964.

10. *Porter v. Powell* (1890) 79 Iowa 151.

11. *Brosius v. Barker* (1911) 154 Mo. App. 651, 136 S. W. 18.

12. (1891) 44 Mo. App. 308. Cf. *Eldred v. Eldred* (1901) 62 Neb. 613.

13. (1911) 154 Mo. App. 651, 136 S. W. 18.

emancipated son since he was no longer entitled to the son's earnings but it is submitted that while the duty to support and the right to the child's earnings are usually concomitant, the former is not based on the latter. The obligation of the parent has been created with a view to protecting the child and not to protecting the parent, and to permit emancipation to absolve the parent from the obligation to support is to furnish the parent with a means of escape from the obligation imposed upon him by the law.

Nor does the obligation of the parent to support the child depend upon the parent's right to the custody of the child. If the mother procures a divorce because of the father's fault and if in the divorce proceeding custody of the child is awarded to the mother, the father remains liable for its support.¹⁴ It would seem also that the father should remain liable wherever the custody of the child is awarded to the mother even tho the divorce should be given to the father for the fault of the wife,¹⁵ since the obligation is primarily the father's and the child should be given the protection of his support apart from any question of the mother's fault. It is submitted that the fault of the mother should be material only in determining whether custody of the child should be awarded to her, and that the father should never be relieved of his duty to support the child as a means of punishing the mother for her misconduct. It is competent for a court to put upon the mother the duty of maintenance, and the above applies only where the decree awarding custody is silent as to maintenance. The fact that the mother is given alimony would seem to be irrelevant to the question of liability for support.¹⁶ *Chester v. Chester*¹⁷ seems to be opposed to this conclusion; the mother had been awarded alimony and the custody of the child, and five years after the divorce sought to be reimbursed for the past maintenance of the child, and in overruling her motion the court intimated that it might have been sustained if she had applied for future maintenance. It seems difficult to justify the result of this decision, and *Chester v. Chester* seems to have been overruled in *Meyers v. Meyers*.¹⁸

It is difficult to see how in *Assman v. Assman*¹⁹ the father was relieved of his duty to support his minor child. It would seem that by sending clothes to the child, enjoining its obedience to its mother and failing to take any step to recover the custody of the child, tho he was in its company in New York, the father really consented to the child's remaining with its mother there. If these facts are sufficient to prove

14. *Viertel v. Viertel* (1908) 212 Mo. 502; *Lukowski v. Lukowski* (1904) 108 Mo. App. 204; *Cole v. Cole* (1905) 115 Mo. App. 406.

15. *Elliott v. Elliott* (1908) 135 Mo. App. 42.

16. *Lukowski v. Lukowski* (1904) 108 Mo. App. 204; *Viertel v. Viertel*, *supra*.

17. (1885) 17 Mo. App. 657.

18. (1901) 91 Mo. 151.

19. (1915) 179 S. W. 957.

consent, the fact that the mother wrongfully took the child from the father would seem to be outweighed. Indeed, a mother living apart from her husband may be entitled to the custody of a child tho *prima facie* the father has the right to custody.²⁰ If the parents in the principal case had been divorced and the wife had been awarded the custody of the child and had taken it to a distant state, it is conceived that the father's liability would have continued. It seems to have been assumed by the court that the liability for support exists only when the father can exercise his right to the custody of the child. It might be a hardship to force the father to go to a distant state to regain the custody of the child, but in the principal case the father did go to the distant state and might easily have retaken custody without a court proceeding. It would seem not at all clear that the father should be relieved of liability to support the child by reason of the difficulty in obtaining its custody. Suppose the child had been taken to East St. Louis. Would the court have reached the same result? Or suppose necessities had been furnished to the child by tradesmen who relied on the father's liability and who were not induced to extend credit by the mother. Might the father have defended an action by such tradesmen on the ground that he had been wrongfully dispossessed of the child and prevented from regaining its custody because of its being kept in a distant state? An analysis of the principal case would seem to indicate, therefore; first, that the father consented to the child's remaining with its mother; second, that by reason of his failure to retake custody he should not be given any advantage by reason of the fact that the child was kept in a distant state; third, that the liability might well have been imposed apart from any question of the difficulty of exercising the right to the custody of the child. The result of the principal case may be defended on the ground that the wife is not shown to have furnished the child with the necessary support in reliance upon the father's liability, nor is it shown that she had any intention to extend credit to the father.²¹

DON CHAPMAN

PUBLIC SERVICE COMMISSION—MEASURE OF REVIEW BY COURTS. *Chicago, Burlington & Quincy Ry. Co. v. Public Service Commission.*¹—The Public Service Commission ordered two intersecting railroads to construct and maintain an exchange track or switch. A suit to review this order was brought in the circuit court and from a judgment affirming the order an appeal was taken to the Supreme Court, which held that upon the facts shown by the record the imposition of the burden

20. Laws of 1913, p. 92. The principal case probably arose before the enactment of the present statute.

21. See *Flugul v. Henschel* (1896) 6 N. D. 205; *Everett v. Walker* (1891) 109 S. C. 129.

1. (Mo., 1915) 181 S. W. 61.

imposed by the order was unjust and the cause was accordingly remanded to the circuit court with directions to render a judgment reversing the order of the Commission. The Public Service Commission Act² provides for a review of the Commission's orders by the circuit court in the first instance and then upon appeal by the Supreme Court, for the purpose of having their reasonableness or lawfulness inquired into and determined. No new or additional evidence may be introduced on the hearing in the circuit court and the cause is to be tried without the intervention of a jury as a suit in equity. In the Supreme Court the original transcript of the record, testimony and exhibits certified to by the Commission and filed in the circuit court, together with a transcript of the proceedings in the circuit court, constitute the record on appeal.

Basing its statement upon these provisions of the statute the Supreme Court said that review of the orders of the Commission was by trial *de novo* upon the record and that the court would give to the findings of the Commission such weight and consideration as it might deem them entitled to under the law and the evidence as tho they were the findings of a trial judge in an equity suit. This is in effect a holding that the orders of the Commission have no finality in any respect. They may be set aside, not because the court finds that the Commission exceeded its statutory power, nor because the order is not based upon any substantial evidence, nor because it is confiscatory, but simply because the court would not have reached the same conclusion on the facts as did the Commission. In such a situation the Commission is little more than a board of masters in chancery and the effective administration of the Public Service Commission Act is for all practical purposes taken out of the hands of the Commission and put into those of the court which for the time being becomes an administrative and not a judicial tribunal. Such a conclusion is destructive of the purpose for which such administrative commissions have been created, if, indeed, it does not render the Public Service Commission Act unconstitutional and void because of the imposition by the legislature of non-judicial functions upon the court.³ Commissions such as the Public Service Commission of Missouri are agencies of the legislature established for the purpose of more effectively regulating public services and utilities than would be possible thru statutes enacted to meet individual situations. The legislature has established general principles of regulation and has left the application of these principles in a particular case to its delegate, the Commission. The acts of the Commission are administrative and only quasi-judicial and its orders are for the time being those of its creator, the legislature.⁴

2. Laws of 1913, p. 641, § 111; p. 644, § 114.

3. *State v. Great Northern Ry. Co.* (Minn., 1915) 153 N. W. 247.

4. Wyman, Jurisdictional Limitations Upon Commission Action, 27 *Harvard Law Review* 545.

As the Commission is entirely the creature of the legislature it is obvious that it can exercise only such power as the legislature has given it and while it is conceivable that the legislature might attempt to make the actions of the Commission subject in all respects to the supervision of the court and its orders valid only when approved by the courts, it is extremely unlikely that the legislature would do this. Certainly the courts should endeavor to construe the statute in such a way, if this is at all possible, as to prevent the imposition of purely administrative functions upon them and at the same time to give the orders of the Commission as much finality as is possible under constitutional limitations.

The limits upon the finality of commission orders and upon court action in reviewing such orders are clearly stated by the Supreme Court of the United States in *Interstate Commerce Commission v. Illinois Central R. R. Co.*,⁵ as follows: "In determining whether an order of the commission shall be suspended or set aside, the Supreme Court must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) whether, even altho the order be in form within the delegated power, nevertheless, it must be treated as not embraced therein, because its authority has been manifested in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow determines the validity of the exercise of the power;" but (d) the Supreme Court may not, "under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful order upon our conception as to whether the administrative power has been wisely exercised." In a recent case in Illinois involving the validity of an order of the Public Utilities Commission of that state fixing freight rates, it was said that "the right to review the conclusion of the legislature or an administrative body is limited to determining whether the board acted within the scope of its authority or the order is without foundation in the evidence, or a constitutional right of the carrier has been infringed upon by fixing rates which are confiscatory or insufficient to pay the cost of the traffic and return to the carrier a reasonable profit on the investment."⁶ The same result has been reached in Minnesota under a statute having some resemblance to the Public Service Commission Act in Missouri.⁷

If the Public Service Commission Act requires the courts to review *de novo* the Commission's orders there is nothing more to be said except that it would seem desirable that the Act should be amended in this

5. (1910) 215 U. S. 452. See *Interstate Commerce Commission v. Union Pacific R. R. Co.*, (1912) 222 U. S. 541.

6. *Chicago, Milwaukee & St. Paul Ry. Co. v. Public Utilities Commission* (1915) 268 Ill. 49.

7. *State v. Great Northern Ry. Co.* (Minn. 1915) 158 N. W. 247.

respect, otherwise the usefulness of the Public Service Commission will be greatly impaired and its effectiveness as an administrative body largely destroyed. It would seem, however, that without much difficulty and, perhaps, more in accord with the legislative purpose, the court might have held that the review provisions of the Public Service Commission Act are to be applied only for the purpose of determining whether the Commission has acted within its powers, and upon substantial evidence and not in violation of constitutional guarantees, and that the validity of the Commission's orders so far as it depends upon matters of fact, when they are not arbitrary and not confiscatory, is unquestionable in review proceedings before the courts.

There is reason for thinking that the order of the commission reviewed in *Chicago B. & Q. Ry. Co., v. Public Service Commission* was confiscatory inasmuch as it appeared from the facts stated in the opinion that the expenses of constructing and maintaining the connecting track in accordance with the order would be greater than the returns from the traffic which might reasonably be expected to use it. If so, it would seem that the statement as to the necessity of a review *de novo* is only *obiter*.

ELDON R. JAMES

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LAW SERIES 12

TORT LIABILITY FOR NEGLIGENCE IN MISSOURI

II LEGAL OR PROXIMATE CAUSE
III CONTRIBUTORY MISCONDUCT OF
THE PLAINTIFF

By GEORGE L. CLARK
Professor of Law

NOTES ON RECENT MISSOURI CASES



UNIVERSITY OF MISSOURI
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LAW SERIES

Number Twelve

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Tort Liability for Negligence in Missouri

II Legal or Proximate Cause

It was stated at the beginning of the first article in this series¹ that in order to make out a *prima facie* case in an action based upon a negligent tort of the defendant, the plaintiff must allege and prove not only that the defendant was negligent, but also that the defendant's negligent misconduct was at least a part of the legal or proximate cause of the plaintiff's damage. In this article will be discussed the subjects of legal or proximate cause and contributing misconduct of the plaintiff.

SIGNIFICANCE OF "LEGAL CAUSE" AND "PROXIMATE CAUSE"

The word *legal* in the phrase *legal cause* seems to mean that the causal connection is sought to be traced to some person or persons upon whom legal liability is sought to be imposed. The phrase *legal cause* is thus used in contradistinction not to *illegal cause*² but to such phrases as physical cause, chemical cause and physiological cause.

It was one of Lord Bacon's maxims that "*in jure, non remota causa, sed proxima, spectatur.*" (The law regards the proximate, not the remote cause.) Bacon commented upon this as follows: "It were infinite for the law to judge the causes of causes and

1. Tort Liability for Negligence in Missouri.—I The Duty to Use Care, 7 Law Series, Missouri Bulletin, pp. 3-39.

2. It is believed that there is no case which has attempted to use the phrase *legal cause* in contrast to *illegal cause*; but there is a case in which the correlative term *legal consequence* has been construed to mean that a culpable defendant will not be liable for an illegal consequence, i. e., a tort by a third person, tho the defendant intended it. In *Vicars v. Wilcocks* (1806) 8 East 1, the action was for slander; the plaintiff alleged and proved that the defendant had told

their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree."³ The word *proximate* literally means nearest in time and place, and Bacon's maxim might be understood, and perhaps was understood at one time, as meaning that the law placed all antecedent causal agencies, both human and non-human, upon the same level and regarded the nearest as the sole cause. It is almost needless to say that such a narrow and mechanical conception proved to be wholly inadequate, and with the exception of one class of cases to be noted later, it has no longer any serious influence; but the term *proximate cause* has lost its literal meaning and has come to be used as a synonym for *legal cause*: in fact, its use in this technical sense is more common than the use of *legal cause*.

NEGLIGENCE AND LEGAL CAUSE MIXED QUESTIONS OF LAW AND FACT

The question of what the defendant's conduct was in a particular case is a pure question of fact: the question of how the defendant should have conducted himself is a pure question of law;⁴ but because the law has not undertaken to define exactly and specifically what a person should do in all possible circumstances that may arise but has contented itself with a rule suf-

one J. M. that the plaintiff had unlawfully cut the flocking cord of plaintiff's employer, J. O.; that defendant did this in order that J. O. would discharge the plaintiff; and that J. O. did so, believing the false charge. Lord Ellenborough said that "the special damage must be the legal and natural consequence of the words spoken, otherwise it did not sustain the declaration; and here it was an illegal consequence, etc." For a deserved criticism of the case, see the opinion of Lord Wensleydale in *Lynch v. Knight* (1861) 9 H. L. C. 577.

3. Bacon, Maxims, Regula I. The language of the court in *Lightfoot & Son v. St. Louis & San Francisco R. R.* (1907) 126 Mo. App. 532, sounds somewhat like Bacon's rule, but the rule as such is not cited or laid down. See *post*, p. 28.

4. Or, to put it differently, whether a given or admitted state of facts amounts to due care or negligence is a question of law. Hence, if a plaintiff alleges certain misconduct of the defendant in his petition, the court will on demurrer decide whether those acts do or do not amount to negligence. *Tarwater v. Hannibal & St. Joseph R. R.* (1868) 42 Mo. 193. And if the parties should be able to agree on the facts, the question as to whether such agreed facts constituted negligence would be a question of law for the court. So, if the facts should be found specially by the jury or where the facts are undisputed.

ficiently indefinite and flexible to apply to all cases, the questions of what conduct amounts to due care in a particular case and whether the defendant's conduct does or does not equal such conduct, are usually not separated. The question of negligence is therefore a mixed question of law and fact. As to whether this mixed question should be decided by the court or jury is not everywhere settled, but the better view is that since the largest and most important ingredient is the question of fact, the jury is the more appropriate tribunal to decide the question, under instructions, of course, by the court.⁵ If the jury could reasonably find only one way, the court may decide it just as it may decide any other question of fact.⁶

Similarly the question of whether the plaintiff's damage was in any degree whatever caused by the defendant's conduct is a pure question of fact; the question, for what part of the

Fletcher v. Atlantic & Pacific R. R. (1877) 64 Mo. 484, 488; *Powell v. Missouri Pacific Ry. Co.* (1882) 76 Mo. 80; *Kelley v. Parker-Washington Co.* (1904) 107 Mo. App. 490, 496.

5. See *McPheeters v. Hannibal & St. Joseph R. R.* (1869) 45 Mo. 22, where the court said that "the question of negligence is peculiarly and exclusively for the jury to determine, and.....if there is any evidence to sustain the verdict we will not interfere." See also *Yarnall v. St. L., K. C. & Northern R. R.* (1882) 75 Mo. 575, 583, where it was held to be error to refer the question of negligence to the jury without instructions. The court said, "what constitutes negligence or care, as we all know, is a question of law for the court. Whether it exists in the given case is a question of fact for the jury. Usually and especially in a case like this, it is believed to be better practice for the court by appropriate instructions, applicable to the particular facts of the case in evidence and on trial, to tell the jury whether these facts, if they believe them to exist, do or do not amount to negligence or care."

6. *Norton v. Ittner* (1874) 56 Mo. 351; *Boland v. City of Kansas* (1888) 32 Mo. App. 8. It is usually said that where the court decides questions because sensible men could find only one way, it becomes a question of law, but this is a confusing terminology. Strictly speaking, law is a matter of rule or principle; and a question of fact does not become one of law merely because the court decides it. A better statement is that juries do not pass upon all questions of fact but only upon doubtful questions of issuable fact; where the question is not doubtful the court decides it because a verdict to the contrary would promptly be set aside as against evidence. While it is not uncommon for a trial court to decide that the defendant's conduct was clearly not negligent or that the plaintiff's conduct was clearly negligent it is quite uncommon for a court to decide that the defendant's conduct was clearly negligent or that the plaintiff's conduct was clearly not negligent, because the question of damages would necessar-

consequences⁷ the defendant shall be held legally liable is a pure question of law. But since the law has not attempted to define specifically the consequences for which a negligent defendant is liable, the question of legal cause is also a mixed question of law⁸ and fact. And like the question of negligence the question of legal cause is decided—if a doubtful one—by the jury under proper instructions by the court.⁹

DEFENDANT NOT LIABLE FOR REMOTE CONSEQUENCES

Theoretically, and as a matter of strict logic, a culpable defendant should be held liable for all the consequences of his misconduct; but our knowledge of causation is so imperfect that it is often a difficult matter of fact to determine whether the plaintiff's damage is a consequence of the defendant's conduct. In order to secure practical justice, therefore, it has long been settled that a defendant will not be held liable for such consequences as are so far removed in the chain of causation that the causal connection becomes merely conjectural.¹⁰ Such conse-

quently remain to be passed upon by the jury. Where the facts showing negligence of the defendant are undisputed, however, it would seem to be the proper practice for the court to leave to the jury only the question of the amount of damages. *Kelley v. Parker-Washington Co.* (1904) 107 Mo. App. 490, 496.

7. Bacon's maxim is stated in terms of cause: *i. e.*, assuming the plaintiff to have suffered loss, was the defendant's conduct the legal cause of this loss? The better and more widely current rules of legal cause, the probable consequence rule and the proximate consequence rule, are stated in terms of consequence: *i. e.*, assuming a culpable defendant, was the plaintiff's loss legally attributable to him? Since two or more culpable defendants may be legally responsible for the plaintiff's damage, it is obvious that it is more advantageous to state the rule in terms of consequence than in terms of cause.

8. *When legal cause is a part of the substantive law of torts.* Whenever special damage does not need to be proved in order to make out a cause of action, for example, in actions for breach of contract, trespass to land, conversion or libel, questions of legal cause are chiefly important in determining the amount of damages to which the plaintiff is entitled; such questions belong, therefore, to the law of damages. But where, as in actions based upon negligence, special damage is an essential element of the tort, the question as to whether the defendant's misconduct was the legal cause of the plaintiff's damage is a part of the substantive law of negligence.

9. *Feddeck v. St. Louis Car Co.* (1907) 125 Mo. App. 24, 32.

10. There is, however, a rule of legal cause occasionally laid down in early cases which, if followed literally, would hold a defendant liable

quences are called remote in contradistinction to near or proximate¹¹ consequences. While time and distance are always important elements in determining remoteness, they are by no means controlling. In *Poeppers v. Missouri Kansas & Texas Ry. Co.*,¹² some sparks from a locomotive of the defendant set

for remote or conjectural consequences. In *Gilman v. Noyes* (1876) 57 N. H. 627, the evidence tended to show that the defendant had left the plaintiff's bars down, whereby the plaintiff's sheep had escaped from the pasture and had been destroyed by bears. The trial court instructed the jury that if the defendant left the plaintiff's bars down, and the sheep escaped in consequence of the bars being left down by the defendant, and would not have been killed *but for* the act of the defendant he was liable for their value. The appellate court held that this instruction was erroneous. Ladd, J., saying, "The sheep would not have been killed, the jury say, but for that (the defendant's) act; does it follow that the damage was not too remote? Certainly, I think, it does not. That one event would not have happened but for the happening of some other, anterior in point of time, doubtless goes somewhat in the direction of establishing the relation of cause and effect between the two. But no rule of law as to remoteness can, as it seems to me, be based upon that one circumstance of relation alone, because the same thing may very likely be true with respect to many other antecedent events at the same time. The human powers are not sufficient to trace any event to all its causes, or to say that anything that happens would not have happened just as it did but for the happening of myriads of other things more or less remote and apparently independent."

To give a concrete illustration of the way in which the "but for" rule would work, suppose X drives his automobile so negligently in a crowded street as to attract the attention of passersby, one of whom, Y, is reminded thereby that he has agreed to meet his friend Z at a railway station; in his haste to get to the station in time Y runs over M. If it had not been for X's negligent driving Y would not have thought of his appointment in time to have gone to the station and therefore would not have run over M; yet it is obvious that no court would sanction a recovery by M against X.

The converse of the "but for" rule is generally true. 25 Harvard Law Review, 109. If the plaintiff's damage would have happened just the same regardless of the defendant's negligent conduct, the defendant's conduct is *not* the legal cause. *Meade v. Chicago, Rock Island & Pacific Ry. Co.* (1869) 68 Mo. App. 92, 101; *Beach v. St. Louis* (1900) 161 Mo. 433, 438.

11. While the phrase *proximate cause* has lost its literal meaning and has come to be used almost exclusively as a synonym for legal cause, the phrase *proximate consequence* seems to have retained its literal significance and is only rarely used in the sense of *legal consequence*, *i. e.* a consequence for which the defendant is legally responsible. See, however, *Hegberg v. St. Louis & San Francisco R. R.* (1912) 164 Mo. App. 517, 552, where "proximate consequence" apparently means legal consequence, if it means anything intelligible.

12. (1878) 67 Mo. 715.

fire to the prairie near the defendant's track about two o'clock in the afternoon of a certain day; the grass being very rank and dry and the wind being high, the fire extended about two and one half miles before night and continued to burn thru the night, tho slowly; but in the morning the wind rose again and blew hard, as was not unusual in that section, and carried the fire some five miles farther, till it reached the plaintiff's property and destroyed it. The court below instructed the jury that "altho they must, in finding a verdict, be governed by the maxim that every one is liable for the natural and proximate but not for the remote damages occasioned by his act, yet this maxim is not to be controlled by time or distance; that if there was but one continuous conflagration from the time the fire was set at or near the railroad track till, by its natural extension, it extended to and burned the plaintiff's property, in such a manner as to constitute but one event, one continuous burning, and that the damage complained of was under the surrounding circumstances the natural result of the escape of the fire from the engine of the defendant, thru the defendant's negligence, they should find for the plaintiff, if the said damage was not caused by any fault of the plaintiff." This instruction was held correct and the judgment for the plaintiff was affirmed.

In determining remoteness there is besides time and distance, a third element, viz., the intervention of other agencies, human or non-human, between defendant's culpable conduct and the plaintiff's damage. This will be discussed later in this article.¹³

THE PROBABLE CONSEQUENCE RULE

A culpable defendant is *prima facie* liable at least for such consequences as might have been foreseen by a prudent man in the position of the defendant;¹⁴ and a rule of legal cause which

13. See post, pp. 17-20, 21-23.

14. The New York and Pennsylvania doctrine that a defendant who negligently sets fire to one building which in turn sets fire to other buildings, is liable only for the loss of the first building, is obviously an exception; but the absurdity of such a holding has been thoroughly exposed and it seems never to have been followed in Missouri. See *Ryan v. New York Central R. R.* (1866) 35 N. Y. 210. For a criti-

is frequently laid down holds him only for such consequences. As this rule is usually expressed,¹⁵ a negligent defendant is liable only for the natural and probable consequences of his misconduct. The word *natural* may mean either in the actual course of nature or in the usual course of nature. If it means in the actual course of nature, then all consequences are natural; there can be no unnatural consequences. If it means in the usual course of nature, then it is difficult, if not impossible, to distinguish it from *probable*. If the rule means all consequences which are in the actual course of nature and also for all consequences which are probable, it would destroy the limitation implied in the word *probable*. It obviously means, therefore, such consequences as are both natural and probable.¹⁶ The word is redundant whether we take it to mean in the actual or in the usual course of nature, for "probable" is either synonymous with "usual" or is a less inclusive term. The rule will therefore be referred to in this article as the probable consequence rule.

Strictly applied, the probable consequence rule would exempt a defendant from liability for improbable as well as for remote¹⁷ consequences. Such a rule obviously makes the test

cism of the doctrine, see *Hoyt v. Jeffries* (1878) 30 Mich. 181, and *Fent v. Toledo, Peoria & Warsaw Ry. Co.* (1871) 59 Ill. 357-362.

It is well settled that a negligent defendant is not liable for the mere causing of mental pain or nervous shock and in some jurisdictions there can be no recovery even if bodily illness results therefrom. See 5 Law Series, Missouri Bulletin, p. 37. This also is an exception to the rule that a negligent defendant is liable for at least probable consequences; tho sought to be explained on various grounds, the real basis for such a holding is the apprehension felt by courts that nervous shock would be easily simulated.

It was the older law, and there are vestiges of it still remaining, that a culpable defendant is not liable where a third person has intervened after the beginning of defendant's misconduct and before the happening of the damage to the plaintiff and where the damage would not have occurred but for the intervention of such third person, even tho such intervention was foreseeable as a probable consequence of the defendant's misconduct. This, however, is fast disappearing except in the field of defamation. 25 Harvard Law Review 118 to 121.

15. *Feddeck v. St. Louis Car Co.* (1907) 125 Mo. App. 24, 32; *Aldrich v. St. Louis Transit Co.* (1903) 101 Mo. App. 77, 90.

16. See *Saxton v. Missouri Pacific Ry. Co.* (1903) 98 Mo. App. 494, 501, "consequences must be probable as well as natural."

17. Where the probable consequence rule is laid down it is not unusual to speak of improbable consequences as remote; where, however,

of legal cause and the test of negligence very similar, both being based upon the standard of the man of ordinary prudence. There is some confusion of the two ideas of negligence and of legal cause to be found in the cases; whether it is a cause or result of the probable consequence rule, it is difficult to say. A typical illustration is to be found in the opinion of POLLOCK, C. B., in *Greenland v. Chapin*¹⁸; the first sentence of the following excerpt states a question of legal cause, while the next sentence, purporting to be an answer to the first, states a test of negligence: "I entertain considerable doubt, whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated. Whenever that case shall arise, I shall certainly desire to hear it argued, and to consider whether the rule of law be not this: that a person is expected to anticipate and guard against all reasonable consequences, but that he is not, by the law of England, expected to anticipate and guard against that which no reasonable man would expect to occur."

DEFENDANT LIABLE FOR IMMEDIATE, THO IMPROBABLE
CONSEQUENCES

No matter how firmly the probable consequence rule is laid down, if the damage follows immediately, the fact that it was improbable does not exempt the defendant from liability. In *Hoepper v. Southern Hotel Co.*,¹⁹ the plaintiff, an employee of the defendant, was injured in the defendant's laundry. The trial court had instructed the jury that "the defendant can not be chargeable in this action unless the injury is of such a character in the manner of its occurrence as might have reasonably been foreseen or expected as the natural result by the defendant of its wringers running roughly and jerking. This was

the probable consequence rule is being contrasted with other rules of legal cause it is necessary to limit the use of the term remote as above indicated.

18. (1850) 5 Ex. 248.

19. (1897) 142 Mo. 379, 384, 388.

held to be erroneous, the court saying that "if the injury follows as a direct consequence of the negligent act or omission, it cannot be said that the actor is not responsible therefor because the particular injury could not have been anticipated."²⁰

One may have been negligent if some danger or harm to another was so likely that a prudent person would either have foregone acting, or have guarded against harmful consequences to the other. It is possible that a defendant ought to have foreseen one particular species of harm and that the plaintiff should actually suffer harm in an entirely different way. A good illustration of this is found in *Hill v. Windsor*,²¹ in which action was brought against the owners of a tug for personal injuries sustained by the plaintiff thru the alleged negligence of those in charge of the tug in causing her to strike violently against the fender of a bridge, on which the plaintiff was at work; the fender consisted of a row of piles driven perpendicularly into the bed of the stream and another row driven at an angle to the first; the plaintiff was standing on a plank fastened to the piles and had put a brace between one of the uprights and one of the inclined piles in order to keep them apart while he fitted them to be fastened together; the striking of the tug against the fender caused the brace between the piles to fall out, the piles came together, the plaintiff was caught between them and was severely injured. The trial

20. See also *Buckner v. Horse & Mule Co.* (1909) 221 Mo. 700, 710; *Dean v. K. O. etc. R. R.* (1906) 199 Mo. 386, 411, where the court said that one "may be liable for anything which, after the injury is complete, appears to have been a natural and probable consequence of his act or omission." Here the word "probable" is obviously misused, and "natural", if it means anything, means in the actual course of nature. Compare *Hill v. Windsor* (1875) 118 Mass. 251, 259, where the court said, "It is enough that it now appears to have been a natural and probable consequence." If probable means anything intelligible, it means foreseeable by a prudent or reasonable person standing in the shoes of the defendant before the occurrence. It is a contradiction in terms to say that an unforeseeable consequence becomes foreseeable because it actually occurs. See also *Harrison v. Kansas City Electric Light Co.* (1906) 195 Mo. 606, 629: "But in case the negligence is shown and the injurious consequences are immediate and flow directly from the negligent act, the person guilty of the act will not be excused for the reason that the particular consequences were unusual and could not ordinarily have been foreseen." See also *MacDonald v. Metropolitan Street Ry. Co.* (1908) 219 Mo. 468, 491.

21. (1875) 118 Mass. 251, 259.

court in charging the jury said, "The accident must be caused by the negligent act of the defendants; but it is not necessary that the consequences of the negligent act of the defendants should be foreseen by the defendants." The upper court held this to be correct, saying: "It cannot be said, as a matter of law, that the jury might not find it obviously probable that injury in some form would be caused to those who were at work on the fender by the act of the defendants running against it. This constituted negligence, and it is not necessary that the injury in the precise form in which it resulted should have been foreseen." Applying this to the facts of *Hill v. Windsor*, the jury would have been justified in finding that the plaintiff would probably fall into the water if the fender were struck by the defendants; that would make the defendants negligent, and the fact that the actual injury to the plaintiff in being thrown between the piles was unforeseeable should not prevent the defendants from being liable therefor.

LIABILITY FOR IMPROBABLE CONSEQUENCES NOT IMMEDIATELY FOLLOWING—THE PROXIMATE CONSEQUENCE RULE

Whether a negligent defendant is liable for improbable consequences which do not follow immediately but which are not so far removed in the chain of causation as to be considered remote or conjectural, it seems impossible to determine from the Missouri decisions. There seems to be no case squarely raising the question and there is so much confusion in the use of terms in the cases dealing with the question of legal cause that one can only guess what the attitude of the court would be. If recovery were allowed, as it certainly should be, it would mean the complete overthrow of the probable consequence rule and the adoption of the proximate²² consequence rule which seems to pre-

22. As this rule is usually stated, the defendant is liable for the "natural and proximate" consequences of his culpable conduct. The word *natural* seems to be redundant here just as it is in the phrase *natural and probable consequences*. See *ante*, p. 9. It certainly does not mean in the usual course of nature, because *usual* is practically synonymous with *probable* and the distinguishing characteristic of the rule is that it allows recovery for improbable consequences. Hence, if *natural* means anything it must mean in the actual course of nature; but this has no limiting effect, because all consequences are natural in

vail in England. Under this rule a negligent defendant is liable for all except remote consequences. The leading English case is *Smith v. London & Southwestern Railway Co.*,²³ which has been frequently cited in Missouri decisions.²⁴ In that case the defendant was sued for negligently burning the plaintiff's cottage. The defendant contended that he ought not to be held liable because no reasonable man could have foreseen that the fire would consume a hedge and pass across a stubble field and so get to the plaintiff's cottage at a distance of two hundred yards from the railway, crossing a road in its passage. The judgment for the plaintiff was affirmed, CHANNEL, B., saying, "When it has once been determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences whether he could have foreseen them or not." And BLACKBURN, J., said, "I also agree that what the defendants might reasonably anticipate is only material with reference to the question whether the defendants were guilty of negligence or not, and cannot alter their liability if they were guilty of negligence. . . . If the negligence were once established,²⁵ it would be no answer that it did much more damage than was expected."²⁶

this sense. The rule will therefore be referred to as the "proximate consequence rule".

23. (1800) L. R. 6 C. P. 14.

24. See, for example, *Hanson v. Kansas City Electric Light Co.* (1906) 195 Mo. 606.

25. It is often stated that the duty to use care must be owed to the plaintiff and this is true where the duty is a positive one based upon a specific relation such as that of a land occupier toward a business visitor; but it is at least doubtful whether it applies to active negligent misconduct any more than it does to intentional acts. See 7 Law Series, Missouri Bulletin, p. 7, note 17. And there seems to be no satisfactory reason why it should apply. If it does not so apply, it is obviously of increased importance whether the probable or proximate rule of legal cause is followed; because if the duty must always be owed to the plaintiff, the defendant can very often escape in a case like that of *Smith v. London & Southwestern Ry. Co.* by showing that while there may have been negligence toward the owners of property close to the railway, there was no negligence to the plaintiff because it was so unlikely that the fire would spread to his property. The point seems not to have been raised.

26. See the opinion of EARL, J., in *Ehrgott v. Mayor of New York* (1884) 96 N. Y. 280. "The true rule, broadly stated, is that a wrongdoer is liable for the damage which he causes by his misconduct. But this rule must be practicable and reasonable and hence has its

CONCURRENT HUMAN CAUSES

(A) *Negligence of Defendant Concurring with Culpable Act of a Third Person.*

The fact that the culpable act of a third person concurs with the negligent act of the defendant to produce damage to the plaintiff does not in any way excuse the defendant; each is *prima facie* liable to the plaintiff for the full amount of the damage, regardless of the relative amount of blame attributable to him; and altho each acts independently of the other, neither can set up the concurring culpable act of the other in defense, for the reason that one can not escape liability on the ground that his conduct was only a part of the legal cause.²⁷

The simplest illustration of concurrent human causes is that of an injury to a plaintiff due to the culpable active conduct of two defendants. In *Matthews v. London Street Tramways Co.*,²⁸ the plaintiff was injured in a collision between the omnibus upon which he was riding and a tram car driven by the defendant's servants. The trial court instructed the jury that to

limitations. A rule to be of practicable value in the law must be reasonably certain. It is impossible to trace any wrong to all its consequences.....The best statement of the rule is that a wrongdoer is responsible for the natural and proximate consequences of his misconduct; and what are such consequences must generally be left for the determination of the jury. We are, therefore, of the opinion, that the judge did not err in refusing to charge the jury that the defendant was liable 'only for such damages as might reasonably be supposed to have been in the contemplation of the plaintiff and defendant as the probable result of the accident.'"

In 25 Harvard Law Review 309, Professor Jeremiah Smith suggests the following rule: "Defendant's tort must have been a substantial factor in producing the damage complained of." Since in negligence cases the causing of some damage to some one is necessary to make a tort, it would be more accurate to say "defendant's tortious conduct." The suggested rule seems to be practically an equivalent of the proximate consequence rule, and has probably the advantage of being more intelligible to juries.

27. *Berry v. St. Louis, Memphis & Southeastern R. R. Co.* (1908) 214 Mo. 593, 598. The only exception to this statement seems to be that where statutes have imposed duties not recognized at common law, they have sometimes been construed as creating liability only in case the defendant's breach of the statutory duty has been the sole cause of the plaintiff's damage. See *Moore v. Abbot* (1850) 32 Maine 46; Bohlen, Cases on Torts, 226.

28. (1888) 60 Law Times Reports (N. S.) 47.

find a verdict for the plaintiff they must be satisfied that the injuries he sustained occurred solely through the negligence of the defendant's servants. The higher court held that the instruction was wrong because the defendant should be held liable even if his negligence was only a part of the cause; the court said that the following instruction should have been given: "Was there negligence on the part of the tram driver which caused the accident? If so, it is no answer to say that there was also negligence on the part of the omnibus driver."²⁹

Similarly, both are liable if the negligence of one consisted in creating a dangerous passive condition which concurs with active force brought to bear by the other. In *Newcomb v. New York Central & Hudson River R. R. Co.*,³⁰ the plaintiff had thru mistake boarded at Buffalo a West Shore train instead of a New York Central train; when he discovered the error, he jumped off the train while it was moving and stepped upon some grease which had been negligently left by the defendant on the station platform. The jury was charged that the defendant was not liable unless plaintiff's injury was caused solely by the negligence of the defendant. This was held to be erroneous, the court saying, "A defendant is liable if his negligence concurred with that of another, or with the act of God or with an inanimate cause, and became a part of the direct and proximate cause altho not the sole cause." The jury in this case might reasonably have found that the West Shore R. R. Co., was negligent in not stopping its train to let the plaintiff get off safely.³¹

Liability likewise rests upon both if the negligence of both consists in creating a dangerous passive condition which needs

29. *Obermeyer v. Logeman Chair Co.* (1910) 229 Mo. 97 seems to be a case of this type; the negligence of the defendant in the construction and operation of its elevators concurred with the negligence of a boy riding in the elevator in stepping on the plaintiff's toes thus causing him to step back and catch his heel between the floor of the ascending elevator and the projection of a foot beam at an unenclosed door.

30. (1902) 169 Mo. 409, 422.

31. In *Rice v. Chicago, Burlington & Quincy R. R. Co.* (1910) 153 Mo. App. 35, 52, the negligence of the defendant in permitting a decayed tree to remain adjacent to the road for many years concurred with the wrongful act of a third person in setting fire to the tree. The tree fell across the track and the plaintiff's eye was destroyed

only the non-culpable active conduct of the plaintiff to bring about harmful results. In *Asher v. Independence*,³² the defendant Lowe negligently built the fire escape of her hotel within eight or nine inches of the defendant city's electric light wire, without notifying the city to remove the wire and defendant city was negligent in not removing the wire after the erection of the fire escape. The plaintiff was injured by receiving a severe shock while using the fire escape; a judgment in his favor against the city was affirmed.³³

(B) *Negligence of Defendant Concurring with Non-culpable Act of Third Person or of Plaintiff.*

If the defendant's negligence concurs with the non-culpable conduct of a third person or of the plaintiff himself, the defendant is alone liable. In *Brennan v. St. Louis*,³⁴ a ditch had been cut across the street by running water; the plaintiff, a child of three, was with her thirteen year old sister, who was pushing a baby carriage with a baby in it; they were all on the sidewalk close to the ditch when another little girl came up, accidentally stumbled against the plaintiff and both fell into the ditch. A charge that the plaintiff should recover tho the stumbling of the girl in some degree contributed to the injury

by one of the branches of the tree shattering the glass of the car window adjacent to which the plaintiff was sitting. In *O'Gara v. St. Louis Transit Co.* (1907) 204 Mo. 724, the plaintiff was injured by the derailment of the defendant's car; the wrongful act of a boy in placing a brick on the track concurred with the negligence of the defendant in failing to discover the peril and stop the car. In *Berry v. St. Louis, Memphis & Southeastern R. R. Co.* (1908) 214 Mo. 593, the defendant's negligence in failing to guard or lock its turntable concurred with the apparently negligent act of children in revolving the turntable so as to injure the four year old plaintiff.

32. (1914) 177 Mo. App. 1.

33. In *Straub v. St. Louis* (1903) 175 Mo. 413, 416, the wrongful act of a shoemaker in placing and leaving an old counter on the sidewalk concurred with the negligence of the city in allowing it to remain; the plaintiff, a boy six years old, was injured by climbing on one edge of the counter thus pulling it over on himself and breaking his leg.

34. (1887) 92 Mo. 482.

was upheld.³⁵ In *Lore v. American Manufacturing Co.*,³⁶ recovery was allowed where the negligent failure of the defendant to guard its machinery concurred with the accidental slipping of the plaintiff upon the smooth floor.³⁷

INTERVENING HUMAN CAUSE

Where after a dangerous passive condition has been created by the defendant a third person comes into intelligent control³⁸ of the situation and negligently causes damage to the plaintiff, it is a case of intervention and not of concurrence; the third person thus comes between the defendant's conduct and the plaintiff's damage. Where the defendant's wrongful act has caused the intervening act of the third person, he ought

35. In *Harrison v. Kansas City Electric Light Co.* (1906) 195 Mo. 606, branches of a tree in the yard of plaintiff's intestate extended over defendant's arc light wire; the movement caused by the wind rubbed the insulation off the wire; while the current was not on, deceased's young son, who knew nothing of the dangers of electricity, wrapped a small copper wire around the arc light wire and fastened the copper wire to the tree in order to keep the arc light from burning the tree. Later the boy cut the copper wire loose from where he had fastened it; another part of the copper wire came into contact with a wire rope swing. Deceased, not knowing what had been done, touched the swing and was instantly killed. Defendant's negligence in not replacing the insulation thus concurred with the non-negligent conduct of the boy, and defendant was held liable.

In *Vogelgesang v. St. Louis* (1897) 139 Mo. 127, 136, steam from a locomotive suddenly blew off while plaintiff's wagon and mule team were on a bridge over the engine; the mules were frightened and ran the wagon into a ten inch excavation which the city had negligently permitted to remain at the edge of the bridge. In *Hordt v. Koenig* (1909) 137 Mo. App. 589, the defendant, landlord of property let to different tenants, maintained a defective fence close to a quarry in the rear of the property; the plaintiff, an invited guest of one of the tenants, leaned against the fence which gave way and he fell into the quarry. The defendant was held liable tho the quarry owner's negligence may have been a concurring cause. In *O'Hara v. Laclede Gas Light Co.* (1908) 131 Mo. App. 428, the defendant's negligence in leaving a gas pipe in the street concurred with the conduct of other children in starting the pipe rolling so that it ran over the plaintiff.

36. (1900) 160 Mo. 608, 626.

37. See also *Mustick v. Dold Packing Co.* (1894) 58 Mo. App. 322, where the negligence of the defendant in leaving a tank of hot water uncovered concurred with the accidental slipping of the plaintiff on a piece of ice.

38. See the opinion of HOLMES, J., in *Olford v. Atlantic Cotton Mills* (1888) 146 Mass. 47.

clearly to be held liable for the results of such intervening act;³⁹ but if he did not cause the intervening act he ought not to be liable for his conduct in such a situation becomes thereby a remote cause. As a practical matter, even tho the proximate consequence rule were to be followed, it would be difficult if not impossible to show that the defendant's culpable conduct caused the conduct of the intervening actor except by showing that the intervening act should have been foreseen. If the intervening actor is also culpable, of course he will be liable.

The importance of determining whether a cause is concurrent or intervening is obvious, for if the defendant's negligent conduct concurred with the conduct of another it is not necessary to show that the defendant should have foreseen the concurring cause;⁴⁰ as heretofore stated, the concurrent human causes may be and usually are independent actors.

In *Kiser v. Suppe*,⁴¹ the defendant was a mine owner; one Johnson, as an independent contractor, had undertaken to sink a shaft and the defendant had agreed to furnish a cable; the de-

39. Not only is causal connection not necessarily broken by the intervening wrongful act of a third person; it has also been held in a few cases that one must under some circumstances guard against the probable subsequent wrongful acts of others; or, to put it a little differently, negligence may consist solely in failing to anticipate and guard against such acts. Such holdings are, however, confined chiefly to the duty of carrier to passenger and to leaving dangerous weapons and explosives near children or others who are unable to appreciate their dangerous nature. Generally speaking, the probability that some third person will make use of a non-dangerous situation created by the defendant to injure the plaintiff is not enough to impose a duty of care upon the defendant. For a collection of cases on this point, see Bohlen, Cases on Torts, 200-213. There seems to be no Missouri case squarely raising the question. *O'Hara v. Laclede Gas Co.* (1908) 131 Mo. App. 428, where the defendant left a gas pipe in the street where children were in the habit of playing and some of the children started the gas pipe to roll so that it ran over the plaintiff, also a child, might have raised the question but it was probably negligence in the defendant to have the pipe there regardless of the action of the children.

40. That it is not necessary that a negligent defendant should have foreseen the operation of a concurrent cause, see *Buckner v. Horse & Mule Co.* (1909) 221 Mo. 700, 710; *Vogelgesang v. St. Louis* (1897) 139 Mo. 127, 136; *Booker v. Southwest Missouri R. R. Co.* (1910) 144 Mo. App. 273, 290; *Beach v. City of St. Louis* (1900) 161 Mo. 433, 438.

41. (1908) 133 Mo. App. 19, 30.

fendant negligently furnished a defective cable; Johnson kept on using it after knowing its condition and the plaintiff was injured by its breaking. It was held that the defendant's negligence was a remote and not a proximate cause. The plaintiff here could have recovered against the defendant only by showing that the defendant should have foreseen, because of his knowledge of Johnson's characteristics, that Johnson would likely be negligent in failing to repair the cable.⁴²

Where the third person has not come into intelligent control of the situation, the case is properly classified as one of concurrent and not of intervening cause, even tho the third person was negligent in not obtaining such intelligent control. (In

42. While cases are comparatively rare where the defendant should have foreseen the neglect of duty of one who later comes into intelligent control of the situation, they are not unknown. In *Harrison v. Berkely* (1847) Strobhart's Reports Law (S. C.) 525, the defendant wrongfully sold liquor to the plaintiff's slave. The slave became intoxicated and was found dead the next morning from the intoxication and consequent exposure to the cool weather. It was held that the jury was justified in finding a verdict for the plaintiff; the slave's will being known by the defendant to be weak, the act of becoming intoxicated was such as the defendant should have foreseen. As the court pointed out, if the defendant had wrongfully sold the slave a rope but without suspicion that he intended to hang himself and the slave had hanged himself, the defendant would not have been held liable for such self destruction, because he could not truthfully be said to have caused it. In *Scott v. Shepherd* (1773) 2 Wm. Blackstone 892, which is generally known as the "squib case", the only question which was really decided was that if the plaintiff was entitled to bring any action at all, trespass was the proper form and not an action on the case. It is frequently cited, however, as deciding a question of substantial law. In that case the defendant threw a lighted squib or firecracker into a market house where there were a great many people; it fell upon the market stand of one Yates; one Willis in order to prevent injury to himself and the wares of Yates, took up the lighted squib and threw it across the market house, where it fell upon the market stand of one Ryal, who instantly and to save his own wares from being injured, took up the squib and threw it to another part of the market house where it struck the plaintiff in the face and, exploding, put out one of his eyes. Tho divided three to one upon the question as to whether trespass was the proper remedy, the four judges agreed in thinking that the defendant should be held liable. Tho Willis and Ryal in turn may have had intelligent control of the situation—the facts are not clear—their acts, whether done instinctively or rationally in self-defense were such as ought to have been foreseen by the defendant. If, however, the act of Ryal in striking the plaintiff had been negligent or intentional, it would be for the jury to say whether under the circumstances the defendant should

Strayer v. Quincy, Omaha & Kansas City R. R. Co.,⁴³ the defendant had furnished cars to the Rombauer Coal Co. for the purpose of loading coal for shipment. One of the cars thus furnished had a defective brake which gave way when the plaintiff, an employee of the coal company, attempted to use it, and the plaintiff was thereby injured. There was nothing to show that the coal company knew that the car was defective, but defendant contended that its own negligence was remote because the coal company was under a duty to inspect the car. The court, however, affirmed the judgment for the plaintiff, holding that causal connection was not thus cut off.

OPERATION OF ORDINARY NON-HUMAN FORCES

In regulating one's conduct so as to satisfy the legal requirement of due care one must take into consideration the ordinary and usual non-human forces by which he is surrounded; nor can he successfully contend that their operation in any way breaks the causal connection between his negligent conduct and the plaintiff's damage. In other words, such forces are always to be considered as concurrent and not as intervening causes. In *Peoppers v. Missouri, Kansas & Texas Ry. Co.*,⁴⁴ already stated,⁴⁵ altho the wind which spread the fire was a high one, it was not unusual in the region where the fire occurred and hence causal connection was not broken thereby. Not only is this true of ordinary inanimate forces; it is also true of the ordinary movements of animals. In *Bassett v. St. Joseph*,⁴⁶ the defendant city had negligently left a hole in one of its streets close to the sidewalk; the plaintiff was passing along the sidewalk when a mule kicked at her and in her effort to escape the mule

have foreseen such conduct. In *Nagel v. Missouri Pacific Ry. Co.* (1882) 75 Mo. 653, 661, the defendant was negligent in not fastening or otherwise guarding its turntable. The court apparently considered it as a case of intervening, not of concurrent cause, when it said, "If the defendant was negligent in not securing the turntable so that it could not be revolved by children, to their injury, the mere fact that it was revolved by other children who were playing upon it at the time the child was injured, will not excuse the defendant, if such act ought to have been foreseen or anticipated by it."

43. (1900) 170 Mo. App. 514, 524, 526.

44. (1878) 67 Mo. 715.

45. See *ante*, p. 7.

46. (1878) 53 Mo. 290.

the plaintiff fell into the excavation. The court held that the action of the mule did not in any way excuse the defendant.⁴⁷

Nor is causal connection broken by bodily diseases following an injury negligently inflicted by the defendant. In *Thomas v. St. Louis, Iron Mountain, & Southern Ry. Co.*,⁴⁸ the defendant's servant was negligent in assisting the plaintiff, a twelve year old girl, to alight from defendant's train; the plaintiff's ankle was sprained, tubercular germs attacked the spot thus weakened and produced permanent damage. It was held that the action of the disease germs did not make defendant's negligent a remote cause.⁴⁹

OPERATION OF EXTRAORDINARY NON-HUMAN FORCES

Where the defendant's conduct has consisted in creating a dangerous passive condition, causal connection is broken by

47. See also *Miller v. St. Louis, Iron Mountain & Southern R. R. Co.* (1886) 90 Mo. 393; the defendant had negligently set fire to the plaintiff's fences close to the railroad track; because of the destruction of the fence, stock came and destroyed the plaintiff's crops before the fence could be rebuilt. See also *Vogelgesang v. St. Louis* (1897) 139 Mo. 127, 137, where a mule team was frightened and ran away because of the sudden letting off of steam by a nearby locomotive.

48. (1914) 187 Mo. App. 420.

49. In *MacDonald v. Metropolitan Street Railway Co.* (1908) 219 Mo. 468, the plaintiff's husband was injured in the derailment of the defendant's cable car on which he was a passenger; after about a month he went in a crippled way to his office to attend to such duties as could not be postponed; some seven months later he died of *angina pectoris*. It was held that it was for the jury to determine whether *angina pectoris* was due to his injury. In *Seekinger v. Philibert & Johanning Manufacturing Co.* (1895) 129 Mo. 590, 603, the plaintiff was injured on the chest by a stick thrown from the defendant's machine and was later attacked by pulmonary tuberculosis; it was held that it was for the jury to determine whether the blow caused the disease. In *Poumeroule v. Postal Telegraph Cable Co.* (1912) 167 Mo. App. 533, the plaintiff after dark ran against one of the defendant's unsheathed guy wires which struck her breast; not realizing the injury was serious she did not consult a physician for some eleven months; it was then necessary to have nearly all of both breasts removed. It was held that the question of causation was properly submitted to the jury and the demurrer to the evidence was correctly overruled. Illustrations of other diseases are as follows: cancer, in *Arnold v. Maryville* (1904) 110 Mo. App. 254, 261; pneumonia, *Hanlon v. Missouri Pacific R. R. Co.* (1891) 104 Mo. 382; erysipelas, *Dickson v. Hollister* (1888) 128 Pa. St. 421; typhoid malaria, *Terre Haute & Indianapolis Railroad v. Buck* (1884) 96 Ind. 346.

the operation of an extraordinary natural force, usually called an "act of God", if the latter is of such magnitude that it would have produced the same damage even if the defendant had not been negligent. It is thus closely analogous to the unforeseeable act of a human being who comes into intelligent control of the situation. On the other hand, if the extraordinary force is not of such magnitude, causal connection is not broken, the extraordinary force or act of God being considered as a concurrent and not an intervening cause.⁵⁰ In *Beach v. St. Louis*,⁵¹ the defendant's premises had been damaged due to the bursting of a sewer; the defense was that the bursting of the sewer was caused by an act of God manifested in an unusual and unexpected rainfall and flow of water. The court said, "It is universally agreed that if the damage is caused by the concurring force of the defendant's negligence and some other force for which he is not responsible, including 'act of God', or superhuman force intervening, the defendant is nevertheless responsible, if his negligence is one of the proximate causes of the damage. . . . If the negligence of the defendant concurs with the other causes of the injury in point of time and place, or otherwise so directly contributes to the plaintiff's damage, that it is reasonably certain that the other cause alone would not have produced it, the

50. In *Standley v. Atchison, Topeka & Santa Fe Ry. Co.* (1906) 121 Mo. App. 537, the plaintiff's evidence tended to show that the defendant company had so negligently constructed its bridge as to diminish the natural capacity of the stream over which it was built. An extraordinary flood came and the overflow upon the plaintiff's land was greater than it would have been if the bridge had been properly constructed. The lower court held that the plaintiff was entitled to recover for the excess damage thus caused and this judgment was affirmed. In *Baker v. Southwest Missouri R. R. Co.* (1910) 144 Mo. App. 273, 290, the defendant's negligence in maintaining and using an insufficient, weak and worn trolley wire concurred with an extraordinary sleet, the wires broke and a live wire struck the plaintiff on the face. The defendant was held liable. In *Benton v. St. Louis* (1912) 248 Mo. 98, 111, the defendant city's negligence in leaving a sink hole close to the sidewalk concurred with an extraordinary storm which filled the sink hole; the plaintiff's seven year old boy fell in and was drowned and the plaintiff recovered. In *Haney v. City of Kansas* (1887) 94 Mo. 334, the defendant's negligence in allowing its guttering, curbing, and sidewalk near the plaintiff's premises to remain out of repair concurred with an extraordinary rainfall.

51. (1900) 161 Mo. 433, 438.

defendant is liable, notwithstanding he may not have anticipated the interference of the superior force, which concurring with his own negligence produced the damage. But if the superior force would have produced the same damage whether the defendant had been negligent or not his negligence is not deemed the cause of the injury."⁵²

Where the defendant is a common carrier and its wrongful conduct has consisted merely in failing to perform its public service duty of due diligence in forwarding freight, and the plaintiff's shipment happens to be left in a place where it is injured by an extraordinary natural force, the defendant is not and should not be held liable. Strictly speaking, such conduct is not tort negligence⁵³ at all where it is mere delay with no foreseeable danger; and the position of the plaintiff's goods due to the delay is merely a non-dangerous condition and not a cause of the plaintiff's damage. If, however, the defendant after actual notice of an impending act of God could by the exercise of ordinary care avoid injury to the plaintiff but fails to do so, such conduct would be tort negligence and the defendant would be liable for damage caused by the cooperation of such negligence and the act of God.

In *Moffatt Commission Co. v. Pacific Ry. Co.*,⁵⁴ the defendant delayed the shipment of two cars of wheat so that they were destroyed in a great flood. Since the defendant had no notice of the storm in time to save the wheat, the judgment for the defendant was affirmed.⁵⁵ On the other hand, in *Wolf v. Amer-*

52. In *Baltimore & Ohio R. R. Co. v. Sulphur Springs School District* (1880) 96 Pa. 65, the defendant was negligent in not putting sufficient culverts thru a dam, but was held not liable for the sweeping away of the plaintiff's school house because the storm was so great that it would have produced the same damage tho the defendant had not been negligent.

53. Tho a common carrier may be sued either in tort or contract for a breach of its customary duty, its obligation is not really either contractual or delictual but based upon the peculiar undertaking of a public service.

54. (1910) 143 Mo. App. 441, 457.

55. In *Lightfoot & Son v. St. Louis & San Francisco R. R. Co.* (1907) 126 Mo. App. 532, a shipment of eggs to Chicago was delayed one day in Kansas City; an extraordinary flood appeared so suddenly that there was no opportunity to save the eggs. In *Werthheimer, Swartz*

ican Express Co.,⁵⁶ wine shipped by the plaintiff to St. Louis by defendant carrier arrived in East St. Louis in December. The weather was severely cold and it could not be forwarded across the river. The defendant placed it on a station platform where it was badly frozen. It was held that even if the cold was so extreme as to be properly called an "act of God", the defendant was not exempt from liability because the act of God merely co-operated with the defendant's negligence.⁵⁷

Shoe Co. v. Missouri Pacific R. R. Co. (1910) 147 Mo. App. 489, shipments of shoes in defendant's hands in Kansas City were destroyed by an extraordinary flood in 1903; plaintiff contended that the loss was partly due to the negligence of defendant in not removing the goods to a place of safety while the water was rising. It appeared that tho the river was rising for some hours, it rose very suddenly to an unprecedented height, without giving time to the defendant to act according to the changed conditions. It does not appear whether if the flood were normal any damage would have occurred. In *Merritt Creamery Co. v. Atchison, Topeka & Santa Fe Ry. Co.* (1909) 139 Mo. App. 149, the plaintiff's butter in the defendant's car was lost in Kansas City in an unprecedented flood; there was no time after notice of the flood to remove the butter to a place of safety and the judgment for the defendant was affirmed.

56. (1869) 43 Mo. 421.

57. In *Pruitt v. Hannibal & St. Joseph R. R.* (1876) 62 Mo. 527, failure of a common carrier to take proper care of hogs in very cold weather concurred with an extraordinary snow storm. In *Pinkerton v. Missouri Pacific Ry. Co.* (1906) 117 Mo. App. 288, 293, the plaintiff's household goods were lost by the defendant in an extraordinary flood; after the defendant's agent knew that the extraordinary flood was near at hand he directed the car which contained the plaintiff's goods to be taken into a place of even greater danger. In *Davis v. Wabash Ry. Co.* (1886) 89 Mo. 340, the evidence was conflicting as to whether after notice of the extraordinary flood the defendant had time to remove the plaintiff's goods out of danger.

III Contributory Misconduct of the Plaintiff

A. CONTRIBUTORY NEGLIGENCE

The General Rule.

The general rule as to contributory negligence is that even tho the defendant was negligent and his negligent conduct was part of the legal cause⁵⁸ of the plaintiff's damage, yet if the plaintiff himself did not use ordinary care for the safety of his person or property and if such lack of care was also a part of the legal cause of his damage, he is not entitled to recover. Such negligence on the part of the plaintiff is called contributory negligence.⁵⁹ The first recorded case in which the doctrine was explicitly laid down is *Butterfield v. Forester*,⁶⁰ in which action was brought for negligently obstructing a highway whereby the plaintiff, who was riding along the road, was thrown from his horse and injured. The trial court charged the jury that if

58. Even tho the plaintiff has not used due care with regard to the safety of his person or his property, it is not a bar to his recovery unless such conduct was a part of the legal cause of his damage. See *Sharon v. Parson* (1895) 17 Pa. 26, where the negligence of the plaintiff's husband in standing upon the steps of defendant's street car was not a part of the legal cause of his death because he was not jarred off by the motion of the car but was negligently put off by the defendant's conductor. Tho the court called the conduct of the defendant's husband contributory negligence it was probably a wrongful assumption of risk; but what is true here of a wrongful assumption of risk would be at least equally true of contributory negligence. See also, *Willmot v. Corrigan Consolidated Street Ry. Co.* (1891) 106 Mo. 535; *Buck v. Peoples' Street Ry. Co.* (1891) 46 Mo. App. 555, 566.

59. Occasionally the word "contributory" is used in speaking of two or more defendants whose negligent conduct has together caused the plaintiff's damage. *Standley v. Atchison, Topeka & Santa Fe Ry. Co.* (1906) 121 Mo. App. 537, 546. From an etymological viewpoint such usage is unassailable, but it is unfortunate because the common usage confines the term to mean contributing negligence of the plaintiff. In the case just mentioned the court should have used the term "concurrent".

60. (1809) 11 East 60.

a person riding with reasonable and ordinary care⁶¹ should have seen and avoided the obstruction, and if they were satisfied that the plaintiff was riding along the street extremely hard and without exercising ordinary care, they should find for the defendant; the higher court held this charge correct, Lord ELLENBOROUGH said, "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not use common and ordinary caution to be in the right. . . . One person being in fault will not dispense with another's using care for himself. Two things must concur to support this action: an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

The policy of the law behind the doctrine of contributory negligence is to place upon all members of society, prospective plaintiffs as well as prospective defendants, the duty to observe such care at all times as will tend to prevent damage. But instead of allowing contributory negligence to defeat recovery altogether, it would be more just to allow it to go only in reduction of damages, thus compelling the negligent defendant to bear a part of the loss and the negligent plaintiff a part. This is the rule in admiralty⁶² where there is no jury trial; but in cases where there is a right to trial by jury, such a solution has been thought unwise;⁶³ probably partly because of the traditional necessity or

61. The standard of care required of plaintiffs is similar to that required of defendants, viz., such care as a person of ordinary prudence would exercise under similar circumstances. *Myers v. Chicago, Rock Island & Pacific R. R. Co.* (1903) 103 Mo. App. 258, 276. Like the questions of the defendant's negligence and legal cause, it is a mixed question of law and fact and decided by the court only where the inference one way or the other is irresistible. *Barton v. St. Louis & Iron Mountain R. R. Co.* (1873) 52 Mo. 253. Tho it is common to say that the plaintiff is under a "duty" to use ordinary care for the safety of his person and property, the duty is of an imperfect and indirect sort, not being enforced by action but merely by refusing recovery in an action against others.

62. *The Max Morris* (1890) 137 U. S. 1. The part usually recovered is one half. In a collision where the defendant also suffered some damage, but less than that suffered by the plaintiff, the case is generally settled by adding the losses together, dividing the sum by two and giving the plaintiff judgment for the difference.

63. *Zumwalt v. Kansas City Suburban Belt R. R. Co.* (1903) 175 Mo. 288, 311.

at least desirability of keeping the issue before the jury simple, and partly because courts have felt that with the admiralty rule it would be difficult to retain the proper control over unreasonable verdicts.

Because of the harsh operation of the doctrine of contributory negligence upon plaintiffs, there has been a strong tendency to mitigate its severity by refusing to apply it in certain classes of cases, thus allowing the plaintiff full recovery in such cases. At one time in Illinois and perhaps in a few other states, it was held that if the negligence of the plaintiff was much less in degree than that of the defendant the plaintiff could recover; this was called the doctrine of comparative negligence. This doctrine has never obtained a foothold in Missouri, tho it has been contended for in several cases.⁶⁴

Exception to the general rule.

Tho very few, if any, jurisdictions have now the doctrine of comparative negligence as such, there is in all jurisdictions an exception to the rule of contributory negligence which amounts in substance to a specialized comparative negligence rule; i. e., in spite of the plaintiff's damage being caused partly by his own negligence, he is allowed to recover in certain specific classes of cases. This exception has been sought to be placed upon several different grounds, but the really fundamental explanation is that in these classes of cases the defendant is—to use an untechnical expression—"more to blame" than the plaintiff.⁶⁵

Tho it is well established in all jurisdictions that there is an exception to the rule of contributory negligence, there is both confusion and disagreement as to the exact limit of the exception. The leading case on the subject is that of *Davies v. Mann*.⁶⁶ In that case the plaintiff had fettered a donkey belonging to him and turned it into the highway to graze; the defendant's wagon, with a team of three horses, coming down a slight descent

64. *Holwerson v. St. Louis & Suburban Ry. Co.* (1900) 157 Mo. 216; *Davies v. Peoples' Ry. Co.* (1900) 159 Mo. 1; *Hurt v. St. Louis, Iron Mountain & Southern Ry. Co.* (1887) 94 Mo. 255.

65. If he is not in some way "more to blame", the law certainly should not shift the whole loss to his shoulders. See post, pp. 36, 38, 39.

66. (1842) 10 M. & W. 546.

ran against the donkey and killed it; the driver of the wagon was some distance behind the horses. The trial court told the jury that tho the act of the plaintiff in leaving the donkey on the highway so fettered as to prevent its getting out of the way of carriages traveling along it, might be illegal, still if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the wagon, the action was maintainable against the defendant. This charge was held correct, PARKE, B., saying, "Altho there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover."

The only reason suggested for the decision was that since the defendant's negligence was the immediate cause it was therefore the proximate cause, evidently meaning that the defendant's negligence was the sole proximate cause and that the plaintiff's negligence was no part whatever of the cause.⁶⁷ There is much of this sort of talk in modern cases on contributory negligence—the only place in our law where Lord Bacon's crude rule of immediate cause is now sought to be applied. If the donkey had been thrown over against X, a bystander, who was using the highway in the exercise of ordinary care, it could not be seriously contended that the negligence of the owner of the donkey was not a part of the legal cause of X's damage unless it were shown that the driver had intelligent control of the situation in time to have avoided the injury by due care and that his failure to so avoid should have been foreseen by the donkey owner.⁶⁸ And if the donkey owner's negligence is a part of the legal cause of X's damage it is unthinkable that it should not be a part of the legal cause of his own damage, unless we are to apply a different rule of legal cause to plaintiffs from

67. The same argument is made in *Maginnis v. Missouri Pacific Ry. Co.* (1914) 182 Mo. App. 694, 712: "The negligence of the party inflicting the injury and not that of the one first at fault is regarded in the law as the sole or proximate cause of the injury. In such cases, it is said the negligence of the defendant supersedes that of the plaintiff and becomes the proximate cause of, while that of the plaintiff is to be treated as remote to, the injury."

68. See *ante*, p. 17.

that which we apply to defendants, which would hardly be conducive to clear thinking. It does not clearly appear in *Davies v. Mann* whether the driver saw the danger or whether his negligence consisted in not seeing it, but the latter seems the fair inference since the driver was some distance behind the horses.

There are three—and it is believed only three—views as to the proper limit of exceptions to the rule of contributory negligence. For the purposes of this article these views will be called, respectively, (1) the conscious last chance⁶⁹ doctrine, (2) the unconscious last chance doctrine, (3) the humanitarian doctrine.

(1) *The conscious last chance doctrine.* According to the conscious last chance doctrine, recovery is allowed only where the defendant was conscious of the peril of the plaintiff's person or property in time to have avoided injury by the exercise of ordinary care, the plaintiff being unable to avoid the injury either because he was unconscious of the peril or because he could not by using ordinary care have extricated himself from the peril if he had known it. In many such cases the plaintiff might perhaps be able to recover on the ground that the defendant's negligence was the sole cause of the plaintiff's damage, the defendant having come into complete and intelligent control of the situation and his negligent conduct not being foreseeable by the plaintiff.⁷⁰ But cases where the defendant's conduct was foreseeable by the plaintiff are not explainable on the modern law

69. The terminology of the courts, "last chance" and "last clear chance," has been avoided because it is difficult, if not impossible, to affix any accurate meaning to these phrases. Conceivably the "last clear chance" might mean the "conscious last chance" and the "last chance" might mean the "unconscious last chance", but the phrases are used indiscriminately in the cases. For example, in *Union Biscuit Co. v. St. Louis Transit Co.* (19.4) 108 Mo. App. 297, 301, the phrase "last chance" was used where the defendant was conscious of the peril in time to avoid.

70. See *ante*, p. 18. The "perhaps" in the text is due to a doubt whether the rule as to an intervening human cause should apply to make a defendant liable where the plaintiff's own negligent conduct was the antecedent cause. Since it is the plaintiff's person or property that is injured and therefore must have been present when the damage was done, it is not so clear that causal connection should be held to be necessarily broken by the unforeseeable negligent conduct of another. If the rule as to unforeseeable intervening human cause

of legal cause, and to that extent at least the conscious last chance doctrine is an exception to the rule of contributory negligence.

It is suggested in some Missouri decisions that a defendant who is conscious of the plaintiff's peril is necessarily a wanton or reckless wrongdoer. In *Williams v. Metropolitan Street Ry. Co.*,⁷¹ the court said that "if the motorman saw the peril or could have seen it by looking in time to have avoided striking him, he was guilty of negligence. And such failure to exercise ordinary care on the part of the motorman eliminated the negligence of the deceased and is characterized as a wanton act." In *Cole v. Metropolitan Street Ry. Co.*,⁷² it was said that "the mere failure to observe ordinary care in situations of this character is of itself a wanton act."⁷³ While such statements may have done no

is not applicable here, then the entire conscious last chance doctrine is an exception to the rule of contributory negligence, except, of course, where the defendant acts wantonly or recklessly.

71. (1909) 141 Mo. App. 625, 630.

72. (1900) 121 Mo. App. 605, 612.

73. See also *Roberts v. Southern Pacific Co.* (1912) 166 Mo. App. 639, 644. In *Everett v. St. Louis & San Francisco R. R. Co.* (1908) 214 Mo. 54, 85, the court said, "The mere fact that the petition charges that the injury was wilfully and wantonly caused by the agents and servants in charge of the train will not prevent a recovery, provided the evidence shows that the injury was the result of their negligence and carelessness. The charge of wilfulness is sustained by proof of negligence." If there was nothing but a point of pleading involved, the last sentence just quoted is to be commended. If the defendant has reasonable notice of the acts with which he is charged, he ought not to be allowed to complain if the petition alleges that the act was wilful and the proof shows that it was only negligent, *provided that by the substantive law the defendant would be equally liable whether the conduct was negligent or wilful*. But when contributory negligence is relied on as a defense the rule as to the liability of a wilful wrongdoer is directly *contra* to the general rule as to the liability of a wrongdoer who is only negligent; it is well settled that contributory negligence is no defense to a wilful tort. Of the five cases cited by the court in support of its statement, in only one was the court speaking with reference to the defense of contributory negligence, namely, *Lange v. Missouri Pacific Ry. Co.* (1907) 208 Mo. 458, 476, and all that the court decided with reference to this point was that where a petition alleges wantonness and recklessness it is not error to give an instruction submitting the question of negligence to the jury.

Possibly some of the confusion just discussed may be due to the prevalence of the unfortunate maxim which is seen very frequently in criminal cases, viz., that "one intends the natural and probable consequence of his acts." If this were taken literally it is obvious that it would wipe out the sound and well settled distinction between intentional and negligent torts. The proper statement is that "one in-

harm in the particular cases in which they were used, the idea is unsound. Tho the difference between negligence on the one hand and recklessness or wantonness on the other may, like most other differences, be reduced to a difference of degree, the law properly treats them as different in kind; i. e., one who acts recklessly or wantonly is treated as a wilful and not merely as a negligent wrongdoer. Strictly speaking, a wilful or intentional wrongdoer is one who desires a particular result which is harmful to the plaintiff; a wanton or reckless wrongdoer is one who does not desire the harmful result but who is conscious of the peril and takes such long chances of injuring the plaintiff that he cannot be permitted to say that he did not intend the result. In other words, tho he stands between the strictly wilful wrongdoer on the one hand and the merely negligent wrongdoer on the other, the wanton or reckless wrongdoer's conduct is more nearly like that of the wilful wrongdoer and the law properly treats it as such.

But mere consciousness of the peril is not enough to make one a reckless or wanton actor. As said by the court in *Atchison, Topeka & Santa Fe Ry. Co. v. Baker*,⁷⁴ "The conduct of the employers in charge of an engine in failing to take measures for the protection of a person upon the track can be characterized as 'wanton' in the sense in which that word is used in this connection only when they actually know of his presence, or when the situation is substantially the same as tho they had such knowledge—when such knowledge may fairly be imputed to them. It is not enough for that purpose that the exercise of ordinary diligence would have advised them of the fact, for their omission of duty in that regard amounts only to negligence. Nor is it enough that they know some one might be in the place of danger; the probability must be so great—its obviousness to the employers so insistent—that they must be deemed to realize the likelihood that

tends the necessary consequences of his acts." This is a rule of common sense and experience: if A throws some water up in the air so that the force of gravity will necessarily bring it down upon the head of B whom A sees near him, A can not usually be heard to say that he did not intend that the water should strike B.

74. (1908) 79 Kan. 183.

a catastrophe is imminent and yet omit reasonable effort to prevent it because indifferent to the consequences. . . . One who is properly charged with recklessness or wantonness is not simply more careless than one who is only guilty of negligence; his conduct must be such as to put him in the class with the wilful doer of wrong."

The conscious last chance doctrine seems to prevail in California,⁷⁵ Montana,⁷⁶ Oregon,⁷⁷ Texas,⁷⁸ and in the Federal⁷⁹ courts. And probably all Anglo-American jurisdictions would go at least as far as the conscious last chance doctrine in allowing recovery.⁸⁰

(2) *The unconscious last chance doctrine.* The conscious last chance doctrine allows recovery only where the defendant was conscious of the plaintiff's peril in time to have avoided the injury by the exercise of due care. The unconscious last chance doctrine goes further and allows recovery where the defendant was unconscious of the peril but could by the exercise of due care have discovered the danger in time to have avoided the injury—the plaintiff, whether conscious of the peril or not, being helpless to avoid it. In *Radley v. London & Northwestern Ry. Co.*,⁸¹ the plaintiffs who owned a colliery near the defendant's railway, had left upon their sidewalk a car with a broken truck upon it, the combined height being about eleven feet. The defendant's servants, in pushing a long line of the plaintiff's empty cars on

75. *Waterman v. Visalia Electric Ry. Co.* (Cal. App., 1913) 137 Pac. 1096; *Saver v. Eagle Brewing Co.* (1906) 8 Cal. App. 127, 84 Pac. 425.

76. *Dahmer v. Northern Pacific Ry. Co.* (Mont., 1913) 136 Pac. 1059.

77. *Stewart v. Portland Light & Power Co.* (1911) 58 Ore. 377, 114 Pac. 936.

78. *Morgan & Bros. v. Missouri, Kansas & Texas Ry. Co.* (1908) 50 Tex. Civ. App. 420; *Cardwell v. Gulf, Beaumont & Great Northern Ry. Co.* (1905) 40 Tex. Civ. App. 67, 88 S. W. 422.

79. *Iowa Central Ry. Co. v. Walker* (1913) 203 Fed. 685; *Hart v. Northern Pacific Ry. Co.* (1912) 196 Fed. 180.

80. In the following Missouri cases the defendant was actually conscious of the peril to the plaintiff tho such knowledge is not essential in Missouri to the defendant's liability. *Cole v. Metropolitan Street Ry. Co.* (1906) 121 Mo. App. 605, 611; *White v. St. Louis & Meramec River R. R. Co.* (1912) 241 Mo. 137, 153.

81. (1876) L. R. 1 App. Cas. 754.

to the siding, pushed the car with the broken truck upon it against a bridge of the plaintiff's and broke it, the car being too high to pass under. The court held that it was not sufficient to give the general rule of contributory negligence, saying, "But there is another proposition equally well established, and it is a qualification upon the first, namely, that tho the plaintiff may have been guilty of negligence and tho that negligence may in fact have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." In this case the defendant's servants did not see what the danger was; their negligence consisted in not investigating when the train was stopped by the bridge. The plaintiff on the other hand, not being present, was entirely unable to avoid the damage to his property. The defendant thus had the last chance to avoid injury, *i. e.*, later in point of time than the plaintiff's chance, tho the defendant was not conscious of that fact. It deserves to be emphasized that the court very properly did not attempt to reconcile its holding with the rule of contributory negligence, but stated explicitly that it was an exception to that rule. The defendant, not being in complete and intelligent control of the situation, could not be said to have been the sole cause of the plaintiff's damage.

The unconscious last chance doctrine probably represents English law.⁸² In this country it is very difficult without care-

82. The leading English case of *Davies v. Mann* seems also to have been a case of unconscious last chance, the plaintiff being unable to avoid because not present and the defendant probably not being conscious of the peril. Some interesting questions are likely to arise under this view, especially in cases where the plaintiff was present at the time of the injury. Of course, if as in *Rapp v. St. Louis Transit Co.* (1905) 190 Mo. 144, his wagon has stalled on the street car track and he is trying to extricate it, it is easy to see that the wagon is in helpless peril. But can it be properly said that a defendant, who is neither drunk nor asleep but is negligent in not seeing the plaintiff's peril, had the last chance to avoid in cases where the plaintiff was unconscious of the peril because of being either drunk or asleep? And if the defendant is considered as having the last chance in such cases, how can we distinguish the case where the plaintiff was neither drunk nor asleep but preoccupied and absent-minded as was the decedent in *Eppstein v. Missouri Pacific Ry. Co.* (1906) 197 Mo. 720?

ful study of the facts in the decisions to determine whether a particular jurisdiction is committed to this view or to the humanitarian doctrine, because in judicial statements little if any attention is usually paid to the ability of the plaintiff to avoid the injury. What seems to have happened is this: many courts took as a basis the conscious last chance doctrine in which it is properly held that it is not necessary that the plaintiff's person or property be in helpless peril in order for the plaintiff to recover, and feeling that it would be placing a premium upon ignorance to hold any less accountable a defendant whose lack of knowledge of plaintiff's peril was due to negligence, they merely inserted the additional clause "or should have known"⁸³ in the conscious last chance doctrine and thus made the usual statement of the humanitarian doctrine.

(3) *The humanitarian doctrine.* The humanitarian doctrine goes even further than the unconscious last chance doctrine and allows recovery tho the plaintiff was not in helpless peril; *i. e.*, recovery is allowed if the defendant knew, or if by the exercise of due care he could have known, of the plaintiff's peril in time to have avoided the injury tho the plaintiff himself may have been negligent in not discovering his peril in time to have avoided the injury.⁸⁴ It is thus not in any sense a last chance doctrine, because it is obvious that the defendant's chance of avoiding may be only equal to⁸⁵ and contemporaneous with

83. There may have been an intermediate step; the phrase "should have known" may at first have been used where the evidence of the defendant's knowledge, tho indirect and circumstantial, was so cogent that the conclusion was irresistible that he knew.

84. For a good statement of the humanitarian doctrine, see *Beckenwald v. Metropolitan Street Ry. Co.* (1906) 121 Mo. App. 595, 599: "Where the injury is produced by the concurrent negligence of both plaintiff and defendant, if the defendant before the injury discovered or by the exercise of ordinary care could or might have discovered the perilous situation in which the plaintiff was placed by the concurring negligence of both parties and neglected to use the means at his command to prevent the injury, then his plea of contributory negligence shall not avail him."

85. If the humanitarian doctrine as ordinarily laid down were literally followed, it would sometimes lead to rather curious results. Suppose A and B, while driving their automobiles in opposite directions, collide; neither one saw the danger in time to avoid the collision by the use of due care, but each could have seen the danger

that of the plaintiff.⁸⁶ According to the often repeated assertions⁸⁷ of the Missouri Supreme Court this is the settled law of Missouri, tho it is at least doubtful whether there are more than a very few cases whose facts absolutely required the laying down of such a broad rule.⁸⁸ In the great bulk of Missouri cases it is not clear whether the defendant really saw the danger in time to avoid, or whether he was negligent in not seeing it.⁸⁹

The humanitarian doctrine has been so called because of its real or supposed influence in preventing the destruction of human life, and it is usually spoken of as if it were limited to personal injuries or death caused by dangerous instrumentalities, especially railroad locomotives, street cars and automobiles. But these limits have not always been carefully observed. In *Borders v. Metropolitan Street Ry. Co.*,⁹⁰ in which the plaintiff recovered

in time to avoid if he had been properly watchful. If the collision happens to damage only A, A may recover from B; if it happens to damage only B, B may recover from A; and if both happen to be injured each may recover from the other! If this last case should arise the courts would probably hold that the doctrine does not apply to cases where both parties were engaged in using dangerous instrumentalities unless one was much more dangerous than the other.

86. See, for example, *Eppstein v. Missouri Pacific Ry. Co.* (1906) 197 Mo. 720, 735, where the negligent failure of both the plaintiff's husband and defendant's engineer to see the peril was probably due to the fact that they were both watching a train of another railroad.

87. See, for example, *Dutcher v. Wabash R. R. Co.* (1912) 241 Mo. 137, 159; *Murphy v. Wabash R. R. Co.* (1910) 228 Mo. 56, 79, where LAMM, J., said, "it has been a favorite doctrine of this court for two of three generations."

88. A careful search has revealed only the following case, tho there are probably more: *Eppstein v. Missouri Pacific Ry. Co.* (1900) 197 Mo. 720, 735. But in matters of procedure courts assume the rule to be well settled. For example, in *Felver v. Central Electric Ry. Co.* (1909) 216 Mo. 195, there was no evidence that the defendant's servants actually did see or that they did not see in time to avoid; there was evidence that they could have seen in time to avoid by the exercise of ordinary care, and the court held that this was sufficient evidence to submit to the jury under the humanitarian doctrine.

89. In *Dutcher v. Wabash R. R. Co.* (1912) 241 Mo. 137, 156, which is considered to be one of the most important cases on the subject, it is fairly clear that the defendant's servants saw the danger in time to avoid and therefore the defendant would have been liable even in jurisdictions which hold to the conscious last chance doctrine. And in *Murphy v. Wabash R. R. Co.* (1910) 228 Mo. 56, there was some testimony that the defendant's engineer saw the peril because he was looking in the direction of the deceased.

90. (1912) 168 Mo. App. 172, 176.

for damages to an electric coupe, the decision is based upon *Flack v. Metropolitan Street Ry. Co.*⁹¹ which in turn is placed by the court upon the humanitarian doctrine. And in *Dale v. Hill O'Meara Construction Co.*,⁹² in which a workman shoveling about a building recovered against a carpenter who sawed off the end of a rafter and let it fall upon him, the court laid down substantially the humanitarian doctrine in these words: "Plaintiff was entitled to recover, notwithstanding his own negligence, if the evidence showed that the carpenter knew or by the exercise of ordinary care, could have known of plaintiff's peril and negligently let the piece of timber fall on him." If a carpenter's saw and the sawed off end of a rafter are "dangerous instrumentalities," it is difficult to say what things are not.

If the humanitarian doctrine is to be applied to the protection not only of persons but also of property and to the uses of other than a few of the more dangerous instrumentalities, there seems nothing to justify it, either in logic or convenience. While the rule of contributory negligence is unjust in compelling the injured party to bear all his own loss, the humanitarian doctrine is even more objectionable because in compelling a defendant who may be no "more to blame" than the plaintiff to bear the whole loss, it involves the shifting of that loss from the place where it fell.

Either the conscious last chance doctrine or the unconscious last chance doctrine can be at least partially justified on the ground that the defendant having a later⁹³ chance to avoid should bear the loss rather than the plaintiff, if either one must

91. (1912) 162 Mo. App. 650. It should perhaps be added that in both cases the motorman apparently saw the danger in time to avoid and therefore the humanitarian doctrine was not necessary to either decision; but the same may be said of a large number of decisions laying down the doctrine. See *ante*, p. 35 and notes 88 and 89.

92. (1904) 108 Mo. App. 90, 97.

93. Throwing the loss upon the one who has the later chance to avoid is supposed to have the effect of tending to induce the continued use of due care on each party regardless of the negligence of the other. Instincts of self preservation and conscientiousness in the performance of duty, are, however, of far greater influence in bringing about the exercise of due care than are judicial decisions, no matter how just or severe.

bear it all. As already pointed out this ground does not exist in cases which require the humanitarian doctrine; hence, if that doctrine is to be supported at all it must be in its narrower application and upon the ground that it really does operate to conserve human life and safety from the perils which are necessarily attendant upon the use of swift and dangerous transportation devices. Does it actually conserve human life and safety? Is it really "humane"? WOODSON, J., has attempted to prove by statistics⁹⁴ that in perhaps the largest class of cases in which the rule has been laid down—namely, trespasses upon railroad tracks—the rule has worked badly in Missouri; and if the statistics have been fairly compiled it must be admitted that, whatever the cause, Missouri has an unenviable record in the number of persons killed or injured while thus trespassing. The gist of Judge WOODSON's argument is that the humanitarian doctrine encourages the use of railroad tracks by trespassers and thereby produces disastrous results. To this argument, however, LAMM, J., has in the same case replied as follows: "In an eloquent and powerful argument at our bar and in a brief of point and force counsel deliver a set attack on the humanitarian doctrine. To feather one arrow aimed at it, it is argued in effect, that instead of being humane it faces the other way, for that it opens a new door to the destruction of life and limb by inviting or encouraging the use of railroad tracks by footmen. If the long and appalling inventory of injuries and deaths on railroad tracks is to be traced to bad doctrines formulated and announced by this bench, then indeed it has much to answer for. But learned counsel, we think, by inadvertence unsoundly argue in that behalf. It may well be doubted if a single person, within the memory of a man now alive, ever walked on a railroad track in Missouri, or refrained from walking there, solely because of any decision made by this or any court on any phase of the law of negligence. Hitherto it has been the generally accepted notion that to hold railroad companies to strict inquest and just

94. See his dissenting opinion in *Murphy v. Wabash R. R. Co.* (1910) 228 Mo. 56, 88, 109. And for the part quoted from LAMM, J.'s, opinion see p. 78 of the same case.

accountability when a child or adult is killed or maimed, conduces to care and caution in the management of death-dealing machines at places where people are permitted by the owners of such machines to be expected."

It is probably true that people who do or do not walk on railroad tracks are not influenced thereby by court decisions, while railroad companies, being comparatively few in number, may be thereby compelled to insist upon their servants' taking greater precaution because of the heavy liability placed upon the companies. But even tho it be not true that the long list of casualties is due to the humanitarian doctrine, it would be difficult to show that it has operated to make the number less than it otherwise would be; and even if it should be thus justified by results, it is at least questionable whether such a doctrine—which, like the doctrine of the turntable cases⁹⁵ must be considered anomalous—should not have been laid down by the legislature which could specify with more certainty the limits of the doctrine and thus probably save a large amount of expensive litigation.

If, as has been stated, the humanitarian doctrine is so well settled judicially that only a statute can overturn it, it should be treated as an anomaly, as the doctrine of the turntable cases is treated, and limited to those cases in which the holding of such doctrine might reasonably be said to have some influence in inducing a higher degree of care. This would include railroad companies and street car companies; it might also include companies using automobiles for transportation on a large scale, but individual drivers of automobiles and other vehicles are quite likely not to know of such a rule. In all other cases, either the conscious last chance doctrine or the unconscious last chance doctrine should be adopted. Until it becomes expedient to adopt the more just principle of dividing the damages in contributory negligence cases, the entire loss should not be shifted

95. See 7 Law Series, Missouri Bulletin, pp. 15-17. In the long run the burden of both that doctrine and of the humanitarian doctrine as applied to railroads is borne by the public in the form of increased rates. This is perhaps its strongest justification.

from the plaintiff to the defendant unless there is a sound and clearly understood reason therefor.

B. UNJUSTIFIABLE ASSUMPTION OF RISK

Another species of plaintiff's misconduct is that of unjustifiable assumption of risk. In contributory negligence the plaintiff is usually, if not always, unconscious that his person or property is in peril; if he fully realizes the peril and deliberately chooses to encounter it and such choice is not justified, his misconduct ceases to be merely negligent and partakes of the nature of consent. It is thus somewhat analogous to recklessness or wantonness in a defendant. The legal effect of unjustifiable assumption of risk is, however, substantially the same as that of contributory negligence; *vis.*, it enables the defendant to escape liability tho his negligence was a part of the legal cause of the plaintiff's damage, unless the defendant is held liable on some one of these doctrines just discussed.⁹⁶ Because the legal effect is similar, the distinction between contributory negligence and unjustifiable assumption of risk is frequently lost sight of.

As already pointed out,⁹⁷ one is justified in risking his bodily safety in an attempt to save human life and under certain circumstances, to save property from destruction. Much less justification is needed, of course, to risk one's property. In *Donovan v. Hannibal & St. Joseph R. R. Co.*,⁹⁸ an action was brought

96. Where a plaintiff is conscious of his peril just before the injury and has an equal chance with the defendant to avoid, he can not recover, whether his conduct be described as contributory negligence or unjustifiable assumption of risk. In *Watson v. Mound City Ry. Co.* (1895) 133 Mo. 246, the court said, "But to carry this doctrine to the length of saying that one who knowingly crossed the track of a railway in such close proximity to a moving train as to be struck thereby before he could cross would not be guilty of concurring negligence, would virtually abolish the law of contributory negligence altogether." See also *Moore v. Lindell Ry. Co.* (1903) 170 Mo. 528, 544. In *Holwerson v. St. Louis & Suburban Ry. Co.* (1900) 157 Mo. 216, 241, there is a dictum that if both defendant and plaintiff are wanton there can be no recovery; this would seem to be sound unless the plaintiff's recklessness has resulted in putting him in helpless peril.

97. 7 Law Series, Missouri Bulletin, pp. 8, 9. The subject of assumption of risk in cases of master and servant will be discussed in a later article.

98. (1886) 89 Mo. 147.

to recover double damages for injuries to cattle; the statute made it the duty of railroad companies to fence rights of way; the defendant company had failed to build a fence between its right of way and the plaintiff's pasture; plaintiff turned his cattle into this pasture after giving the defendant due warning, and some of them were killed by the defendant's trains. The court said, "There has been no negligence⁹⁹ in his pasturing his cattle upon his own premises; . . . he can not be deprived of the ordinary and proper use of his property by the failure of the railroad to perform its duty." To have held otherwise would have largely defeated the purpose of the statute.¹⁰⁰

A plaintiff is not bound to guard against the merely contingent negligence of others, such as the possible negligence of a railroad company in allowing sparks from its locomotives to set fire to dry grass which in the ordinary course of husbandry is left on the ground.¹⁰¹ In *Coates v. Missouri, Kansas & Texas Ry. Co.*,¹⁰² the court refused to apply this principle to shavings allowed to accumulate around a house in the course of erection. But the decision in this case has apparently been abrogated by a statute¹⁰³ making railroad corporations absolutely liable for loss occurring thru fire communicated by locomotives, and giving to such corporations an insurable interest in the property along their routes.

99. Notice the use of the phrase "no negligence"; it would have been more accurate to say that under the circumstances the plaintiff's assumption of the risk of losing his cattle was justifiable, because he obviously knew the peril. If he had not known the peril, then the expression "no negligence" would have been quite proper; as a matter of phraseology, a plaintiff is never justified in being negligent; if his conduct does not amount to an assumption of risk but is justifiable, it would be considered not negligent at all.

100. The decision has been followed in a case where apparently no statute was directly involved. *Gooch v. Bowyer* (1895) 62 Mo. App. 206. In that case the defendant was guilty of negligence in placing barbed wire along a division fence; the plaintiff, seeing the condition of the wire, nevertheless turned his stock out to graze and his horse was injured by the wire. The court said that "he had the right to pasture his own stock on his own premises, and he could not be deprived thereof by the defendant's neglect of duty."

101. *Fitch v. Pacific R. R. Co.* (1870) 45 Mo. 322.

102. (1875) 61 Mo. 38, 44.

103. Revised Statutes 1909, § 3151.

C. EFFECT OF PLAINTIFF'S VIOLATION OF STATUTES OR ORDINANCES

If a plaintiff at the time of his injury is engaged in the violation of a statute or ordinance he is in general barred from recovery against a negligent defendant if his own misconduct is a part of the legal cause of the damage. In determining the question of legal cause the most important element to be considered is the purpose of the statute or ordinance. In *Welsh v. Geneva*,¹⁰⁴ the plaintiff was moving a traction engine weighing six tons along the defendant's highway; coming to a bridge he concluded it was safe and attempted to cross it without spanning it with planks as required by statute in case of engines of that weight. It was held that it was proper to direct a verdict for the defendant since the use of the heavy engine contributed directly to the breaking of the bridge. In this case the purpose of the statute was to protect the bridge as well as the property of travelers. In *Berry v. Sugar Notch Borough*,¹⁰⁵ the defendant had negligently left a decayed tree standing in one of its streets, dangerous to travelers. The plaintiff, a motorman, while running a street car at the rate of fifteen miles an hour, was injured by the tree falling on the car. The ordinance made it illegal to run a street car more than eight miles an hour. It was held that this did not bar the plaintiff since it was not the cause of the accident. If the tree had fallen before the plaintiff reached it, and because of the high speed the plaintiff could not stop the car, he would probably have been barred, but on the ground of contributory negligence rather than that of being engaged in an illegal act. The purpose of the statute in this case was obviously to protect pedestrians and people in their vehicles from being run over by the street cars; it was not to protect the cars or people therein itself from being injured by falling trees.

In Missouri there seem to be only three cases on the point. In *Blackburn v. Southwest Missouri R. R. Co.*,¹⁰⁶ a city ordi-

104. (1901) 110 Mo. 388.

105. (1899) 191 Pa. 345.

106. (1914) 180 Mo. App. 548.

nance required house movers to obtain a permit from the city before they could lawfully move houses along the streets; while the plaintiff was moving a house without having obtained such permit he found it necessary to lift some wires for the house to pass under; he thought the wires were all telephone wires because they were uninsulated, but some of them were defendant's electric light wires and plaintiff's hands were seriously burned. It was held that plaintiff's violation of the ordinance was no bar to his recovery. The purpose of the ordinance was obviously to regulate street traffic and not to prevent house movers from being injured by electric wires. In *Chicago & Alton R. R. Co. v. Kansas City Suburban Belt R. R. Co.*,¹⁰⁷ the defendant negligently left on the plaintiff's track some cars with which the plaintiff's passenger train collided; the defense set up was that the plaintiff was at the time engaged in violating the speed ordinance, but this was held to be no bar to recovery. The purpose of the statute here was to protect pedestrians and drivers of vehicles at public crossings, not to prevent collisions with the property of another transportation company. In *Reed v. Missouri, Pacific Ry. Co.*,¹⁰⁸ the plaintiff alleged that the defendant negligently permitted fire to escape from its engines and burn the plaintiff's rick of hay. The defense set up was that the rick of hay had been placed within one hundred yards of the defendant's right of way, in violation of a statute, but this was held not to be a bar to recovery. The decision is to be supported, if at all, upon the ground that altho the purpose of the statute was to prevent the destruction of hay ricks, the facts in the particular case were such that the hay would just as certainly have burned if it had been beyond the one hundred yard limit. This is probably what the court had in mind when it said that "it is not shown that had the plaintiff not stacked his hay within the prohibited one hundred yards of the defendant's right of way it would not have been burned." The court seems to be wrong, however, in

107. (1898) 78 Mo. App. 245.

108. (1892) 50 Mo. App. 504.

thus assuming that the burden of proving legal cause was upon the defendant.¹⁰⁹

To sum up, if the purpose of the statute or ordinance is to prevent the sort of injury of which the plaintiff complains, his violation of the statute or ordinance should bar him unless the injury would have happened just the same regardless of such violation; where the purpose was not to prevent such injuries, the plaintiff's violation is of no legal consequence.

The subject of pleading and proof in negligence cases and the subject of imputed negligence will be dealt with in a subsequent article.

GEORGE L. CLARK¹¹⁰

109. The doctrine of *res ipsa loquitur* applies only to the proof of the defendant's negligence, not to the proof of causation. *Benedick v. Potts* (1898) 88 Md. 52.

110. In the preparation of this article valuable assistance has been rendered by Sidna P. Dalton, Esq., of the class of 1918.

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NOTES ON RECENT MISSOURI CASES

BILLS AND NOTES—LIABILITY OF ANOMALOUS INDORSER UNDER THE NEGOTIABLE INSTRUMENTS LAW. *Overland Auto Co. v. Winters.*¹ This case raises the much discussed questions as to the liability of a person who places his name on the back of a note prior to or at the time of delivery. A and B, associates in business, contracted to purchase an auto to be used in their business from C, the agent of the plaintiff company. In payment C took a note payable to himself, signed by A as maker and indorsed on the back by B prior to delivery. The note read, "We promise to pay." Plaintiff having failed to aver presentment and notice so as to charge B as an indorser contended that he was liable as maker. The majority of the Kansas City Court of Appeals held that under the Negotiable Instruments Law,² such a party is deemed an indorser and that no evidence is receivable to show that he intended to bind himself in any other capacity. In a dissenting opinion, ELLISON, P. J., expressed a doubt as to this proposition, sug-

1. (1915) 180 S. W. 560. This case has been commented on in 29 Harvard Law Review 549 and in 25 Yale Law Journal 411.

2. Revised Statutes 1909, §§ 10033, 10034.

gesting that the ambiguity created by the word "we" in the promise might justify the introduction of extrinsic evidence to show that such party was not one of that class of persons whose liability is fixed by the act, namely, those signing "otherwise than as maker" or those "not otherwise a party to the instrument."

Prior to the Negotiable Instruments Law, there existed a great diversity of decisions as to this question, and it was the evident purpose of the framers of the act in the enactment of sections 10033 and 10034³ to fix the liability of such a party beyond dispute. In a majority of the cases arising under the law, these sections have been held to fix the anomalous indorser's liability as that of indorser and to preclude the introduction of any extrinsic evidence to vary that liability.⁴ The act, however, has not been unanimously so construed. A few cases hold that only a *prima facie* liability as indorser is created, which may be explained away by parol evidence.⁵

How far do ambiguities upon the face of the instrument justify a resort to parol evidence? Admitting that a person has signed "otherwise than as maker" the act settles the question, for such a person's liability can be other than that of indorser only in case he "clearly indicates by appropriate words his intention to be bound in some other capacity." But by what means is it to be determined whether a person has signed otherwise than as maker? Does the act refer to persons who intend to sign in another capacity than that of maker irrespective of the place of signature, or does it refer to persons who place their signatures in other than the usual place for the maker's signature? If the class is determined by the intention and that intention be ascertainable by extrinsic evidence, the purpose of the act is defeated. But if, tho a person signs in the usual place for an indorser's signature, there appears something upon the face of the instrument which indicates that his liability was intended to be that of maker, it might be contended that extrinsic evidence should be resorted to. Such a contention might not be without merit were section 10033 alone to be considered. But section 10034 is more definite as to the class affected by it, applying to "a person,, not otherwise a party to an instrument" who "places his signature thereon in blank before delivery." Viewing the two sections together in the light of the

3. The corresponding sections of the Uniform Negotiable Instruments Law are §§ 63, 64.

4. *Rockfield v. First National Bank* (1907) 77 Ohio St. 311, 83 N. E. 392, 14 L. R. A. (N. S.) 842; *Gibbs v. Guaraglia* (1907) 75 N. J. Law, 168, 67 Atl. 81; *McDonald v. Luckendach* (1909) 170 Fed. 484; *Mechanics etc. Bank v. Katterjohn* (1910) 137 Ky. 427, 125 S. W. 1071. See collection of cases in Brannan, Negotiable Instruments Law, p. 77.

5. *Kohn v. Consolidated etc. Co.* (1900) 63 N. Y. Supp. 265 (semble); *Mercantile Bank v. Busby* (1908) 120 Tenn. 652, 113 S. W. 390; *Haddock, Blanchard & Co. v. Haddock* (1908) 192 N. Y. 499, 85 N. E. 682.

circumstances which led to the adoption of these provisions of the act, it seems preferable to hold that the act fixes the anomalous indorser's liability as that of indorser in all cases where it does not appear clearly from the instrument itself that he was intended to be bound in another capacity. This proposition is greatly strengthened, if indeed it is not established beyond controversy, by section 9988 which provides that "where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser." The effect of this section seems not to have been considered by either the majority or the dissenting judge.⁶

Conceding that under the facts of the principal case B was liable as an indorser, is he such an indorser as may claim presentment and notice? It is difficult to see how the holder can be relieved of the duty to give notice of dishonor by virtue of section 10085 on the theory that A was an accommodation maker. An accommodation party is defined by section 10000 as one who signs "without receiving value therefor." A can hardly be brought within this definition since he and B together received the consideration for the note. If it be accurate to say that as to the interest which B received in the property A is an accommodation maker, the consequence must inevitably follow that with respect to the interest which A received in the property, B is an accommodation indorser. Under this theory B would be at the same time both an accommodation and an accommodated indorser, in the one capacity entitled and in the other not entitled to claim demand and notice.

There has been considerable controversy as to the proper interpretation of section 10000 (section 29 of the uniform act).⁷ Probably the better view is that "without receiving value therefor" means *without receiving any value for the bill and not without receiving any consideration for lending his name*.⁸ Even under this construction, the one most favorable to the plaintiff in the principal case, A would not be an accommodation maker since he received value from the payee for the bill, and not merely a consideration for lending his name.

These considerations seem to impel the conclusion of the majority of the court that B was an indorser and as such entitled to both presentment and notice.

DEAN H. LEOPARD

6. Section 9988, paragraph 6, imposing a joint and several liability upon two or more persons who sign an instrument containing the words "I promise to pay," suggests a danger of attaching too much importance to the number of the subject of the promise.

7. See Brannan, *Negotiable Instruments Law*, p. 162 *et seq.*, for an account of the Ames-Brewster controversy on this point.

8. *Morris County Brick Co. v. Austin* (1910) 79 N. J. Law 278, 75 Atl. 550.

COURTS—CONFUSION IN MISSOURI SYSTEM OF APPELLATE COURTS.
*Rowke v. Holmes St. Ry. Co.*¹ The defendant constructed a street railway in Kansas City between March, 1899 and July, 1900. On September 24, 1904, the plaintiff began suit for \$35,000 damages for injury alleged to have been caused to his property by the construction and operation of the railway. On April 25, 1906, the defendant had judgment and on September 13, 1906, the plaintiff appealed the case to the Supreme Court which on May 31, 1909 reversed the judgment and remanded the cause for a new trial because of error committed at the trial.² At the second trial in October, 1910 the plaintiff had judgment for \$5000. On June 7, 1911 the defendant appealed to the Kansas City Court of Appeals which on June 3, 1912 transferred the case to the Supreme Court under the statute of 1911.³ The case was argued before the Supreme Court *en banc* on April 28, 1913, and in an opinion delivered on April 2, 1914 it was transferred back to the Kansas City Court of Appeals on the ground that the statute in question was unconstitutional.⁴ This opinion was by a court divided four to three. On June 14, 1915, the Kansas City Court of Appeals rendered an opinion again transferring the cause to the Supreme Court on the ground that it involved a constitutional question which had not been considered by the Supreme Court on the previous transfer.⁵ On November 4, 1915, the case was again argued before the Supreme Court *en banc* and on December 8, 1915, it was again transferred back to the Kansas City Court of Appeals on the ground that no interpretation of the Constitution was necessary to a decision.⁶ On May 1, 1916 the Kansas City Court of Appeals reversed the judgment and remanded the case for a new trial.

This history is reviewed because of its bearing on the defects in the organization of Missouri courts. The case is not typical, and it is not often that litigation is so prolonged or that such confusion exists between courts; but it is not the only case in which such confusion has existed.⁷ It is a sufficient indictment of the system that such a bandying of a case should be possible. This fault is not the courts'—it is inherent in the Missouri system of court organization. It is bad enough that the plaintiff should be made to wait so many years and

1. (1915) 181 S. W. 78.

2. (1909) 221 Mo. 46, 119 S. W. 1094. The case was heard by Division One of the Supreme Court, LAMM, WOODSON and GRAVES, JJ., being present.

3. (1912) 166 Mo. App. 207. In 1909 the jurisdiction of the Courts of Appeals was enlarged from \$4500 to \$7500. Laws of 1909, p. 897, Revised Statutes 1909, § 3937. In 1911, the act enlarging the jurisdiction was amended by adding "that the Supreme Court shall retain and have full exclusive appellate jurisdiction in any case pending in which the Supreme Court has made any decision or ruling." Laws of 1911, p. 190.

4. (1914) 257 Mo. 555, 166 S. W. 272. A rehearing was denied on April 13, 1914.

5. (1915) 177 S. W. 1102. A rehearing was denied on July 2, 1915.

6. (1915) 181 S. W. 77.

7. See for instance, *Smith v. Glynn* (1912) 144 S. W. 149, (1915) 177 S. W. 848, (1916) 183 S. W. 681.

to conduct such expensive litigation to get the redress to which he may be entitled; but it is difficult to justify his being sent four times to another court to get his relief. And the end is not yet! It is still possible that the case may again be taken to the Kansas City Court of Appeals and on to the Supreme Court.

But there are more serious results than possible injustice to this particular plaintiff. Such confusion tends to undermine the confidence of the public in the whole judicial system; it entails a serious congestion of dockets when so much of the courts' time must be consumed in deciding questions of jurisdiction among themselves; it spells a waste of the courts' time and the state's money in the determination of problems which in a simpler system would be non-existent; in short, it is to some degree responsible for the existing situation in the appellate courts, all of which are overworked and two of which are notoriously behind their dockets.

Can a simpler system be devised? In 1913, the Missouri Bar Association adopted a resolution looking toward the merger of the Courts of Appeals and the Supreme Court and the organization of new divisions of the latter.⁸ A unified system of appellate courts would make impossible such a history as that of *Rourke v. Holmes St. Ry. Co.*, and it would mean a large measure of relief from the congestion and delays and consequent injustices in the present system.

MANLEY O. HUDSON

ESTATES—IMPLICATION OF REMAINDERS—ALIENABILITY OF CONTINGENT REMAINDERS—ENLARGEMENT OF ESTATES. *Faris v. Ewing*¹—A testator devised certain land to his son John and his daughter Mollie, under the express conditions "that neither of these devisees having any children and that if either dies leaving no living child the other shall inherit the entire land and if both shall die leaving no child or children then said lands shall revert to my estate and be divided amongst my other living children or if dead their children if any living, said lands cannot be sold by said devisees, except for life of either or the survivor but if they or either of them shall have any living children then said lands shall be an absolute gift." John later married and died leaving the plaintiff his only child; Mollie still lives childless. After the birth of the plaintiff, John and Mollie attempted to convey the land and the defendant claims under this conveyance. The court was unable to agree on the construction to be put on the will. WALKER and GRAVES, JJ., thought that John and Mollie took the fee which could be aliened after the birth of a child to either; they therefore denied any interest to the plaintiff and

8. 1913 Proceedings of Missouri Bar Association, p. 27 *et seq.*

1. (1916) 183 S. W. 280.

wanted to declare the defendant owner of the entire land. WOODSON and BLAIR, JJ., thought that John and Mollie took only life estates, with an implied contingent remainder as to the share of each in its child or children, and an alternate contingent remainder limited on the death of either without a living child to the other; they concluded that the plaintiff was invested with the fee to that half given to her father, and a contingent remainder in fee in Mollie's half. BOND and FARIS, JJ., thought that each took a life estate which upon the birth of a child to one was to become a fee in that one, and subject to this possibility each took a contingent remainder in the land of the other; they seem to have concluded that the plaintiff was entitled to no interest in the half devised to her father, since it had passed by his conveyance, but that she was entitled to a contingent remainder in fee in the half devised to Mollie. The *per curiam* opinion, analysed elsewhere in this number of the Law Series, purported to be a compromise giving half of the land to the defendant; whether the plaintiff took the other half is not clear, tho as a result of the opinions the plaintiff was entitled to only a contingent remainder in a half.

The language of this will is so rare and so confused that the case is of little value as a precedent of interpretation. Comment on the construction would be profitless therefore. But some phases of the case seem to merit attention, *viz.*, the implication of remainders, the apparent oversight of the alienability of contingent remainders, and the enlargement of estates.

Two of the judges, WOODSON and BLAIR, who thought that life estates were conferred on the first devisees, were willing to imply remainders in their children. They read the gift to be to John and Mollie for life, and if either dies without a child or children living at his death, then his half should go to the other. So read, the case goes far in implying a remainder to the child or children. The implication of estates tail where there is a devise to A for life or in fee with a gift over on his death without issue, is familiar enough.² Since the statute making failures of issue definite, this implication has been discontinued;³ the implication depended on an indefinite failure of issue and probably had its origin in an effort to escape the rule against perpetuities. To justify an implied gift to the child when there is a devise to A for life and a gift over if A dies without a surviving child, there should be a clear intention that the child is to take. In the principal case, WOODSON and BLAIR, JJ., seemed to assume this intention. They took for granted a desire of the testator to preserve the land to the donees and their children. WALKER and GRAVES, JJ., ex-

2. See an article on Estates Tail In Missouri, in 1 Law Series, Missouri Bulletin, 9. See also, Theobald, Wills (5th ed.) p. 642.

3. *Yocum v. Siler* (1900) 160 Mo. 281; *Gannon v. Albright* (1904) 183 Mo. 238.

pressly refused to imply a gift to the donees' children, relying chiefly on the fact that the first donees were not limited to life estates. Of course express estates will never be cut short by the implication of other estates, for the chief purpose of the implication is to supply a hiatus.⁴ In view of the fact that there has been so little discussion in the Missouri reports of the implication of remainders, it is to be regretted that the point did not receive more attention in *Faris v. Ewing*.

Four of the judges, WOODSON, BLAIR, BOND, and FARIS, seem to have concluded that John had a contingent remainder in Mollie's undivided half of the land and the *per curiam* opinion seems to have at least left it open to the plaintiff as heir of John to claim a remainder in this half.⁵ But this quite overlooks the fact that if John had a contingent remainder it passed to the trustee by his conveyance and from the trustee to the defendant. The possibility of conveying a contingent remainder is now settled in Missouri. Tho not alienable at common law,⁶ it was included in the statute of 1865 which provided for conveying "any estate or interest" in land by deed.⁷ If John had a contingent remainder in Mollie's undivided half, it passed by his deed tho the contingency should not occur until after his death. The will made no express gift of Mollie's half to the child of John. It is submitted that the four judges who apparently gave the plaintiff John's contingent remainder in Mollie's half, overlooked this point. But their conclusion also necessitated saying that the contingent remainder given to John by the will could descend to the plaintiff as his heir. No sound reason is perceived why a contingent remainder should not be a descendible interest in cases where the survivorship of the remainderman is not a part of the contingency; but numerous statements may be found in the Missouri reports to the effect that contingent remainders are not descendible.⁸ The judges in *Faris v. Ewing* seemed to assume that a contingent remainder is descendible, but *Hauser v. Murray*⁹ seems to be clearly *contra* and *Faris v. Ewing* cannot be taken to have overruled it. It seems clear that four of the judges overlooked both the alienability and the non-descendibility of the plaintiff's father's contingent remainder in the undivided half devised to the defendant's wife, and that if these had been perceived the result as to that part of the land should have been otherwise.

4. 1 Jarman, Wills (6th ed.) p. 669.

5. The effect of the *per curiam* opinion has been analysed in another comment on this case. *Post*, p. 58.

6. Fearne, Contingent Remainders, p. 385.

7. Revised Statutes 1865, c. 109, § 1, Revised Statutes 1909, § 2787; *Godman v. Simmons* (1893) 113 Mo. 122; *Summet v. Realty Co.* (1907) 208 Mo. 501. See 8 Law Series, Missouri Bulletin, p. 15.

8. *Delassus v. Gatewood* (1880) 71 Mo. 371; *Payne v. Payne* (1893) 119 Mo. 174; *Hauser v. Murray* (1913) 256 Mo. 58, 97. See also *Dickerson v. Dickerson* (1907) 211 Mo. 483; *Sullivan v. Garesche* (1910) 229 Mo. 496.

9. (1913) 256 Mo. 58.

One further point seems worthy of comment. BOND and FARIS, JJ., thought that John and Mollie each took an estate for life, subject to be enlarged into a fee by the birth of a child. What is this process of enlargement? The common law gave definite rules which, once the intention is ascertained, can be so applied as to enable one to say exactly what estates exist in particular land at any time. By the law of merger two estates in the same land vested in the same person at the same time may be so joined that the present would be swallowed up into the future estate, and since it is one of the requisites of a merger that the expectant estate should be at least as large in legal contemplation as the present estate, merger may without impropriety be spoken of as a process of enlargement. There is also the enlargement of estates on condition as first explained in *Lord Stafford's Case*,¹⁰ in such instances as where a testator devised land to A for life on condition that if A performed a certain condition he should have the fee. A takes a life estate which is said to be subject to enlargement on condition. Some commentators write of this as tho A took an estate for life with a contingent remainder in fee and as tho the enlargement occurred by merger when the remainder vested; but the result of *Lord Stafford's Case* cannot be so explained inasmuch as the particular estate was a fee tail which could not be merged into a fee simple. This enlargement must be something more than merger therefore.¹¹ Lord Coke required four incidents for an estate subject to enlargement: (1) a particular estate; (2) a continuance of this particular estate in the grantee until the increase happens; (3) the immediate vesting of the increase on the happening of the condition; (4) the particular estate and the increase ought to take effect by one and the same instrument or by several instruments delivered at the same time. These incidents are stated as necessary, also, by Fearn, ¹² by Cruise, ¹³ and by Sheppard ¹⁴ who adds a fifth incident, viz., that the condition must be lawful.

Such enlargement of estates, while recognized by Coke, ¹⁵ Fearn, Smith, Cruise, Sheppard, Preston, ¹⁶ and seemingly Sugden, ¹⁷ has apparently not been noticed by more recent writers such as Williams, Leake, Challis, Gray, Washburn and Tiffany. It seems not to have

10. (1609) 8 Coke 146.

11. The distinction between a limitation enlarging an estate and a remainder is sharply drawn in Smith, *Executory Limitations*, § 163.

12. Fearn, *Contingent Remainders*, p. 279.

13. Cruise, *Digest*, 283.

14. Sheppard, *Touchstone*, p. 128.

15. See Coke, *Littleton*, 217b.

16. 2 Preston, *Abstracts*, 188.

17. Sugden's reference is quite bare. 1 Sugden, *Powers* (8d Amer. ed.)

89. See also 2 Blackstone, *Commentaries* (Lewis' ed.) 152.

been recognized by the Missouri court until *Sheppard v. Fisher*.¹⁸ The principle is now applied by BOND and FARIS, JJ., in *Faris v. Ewing*, but without any clear enunciation of it; but accepting the construction put on the will by these judges, the principle cannot be applied to both of the undivided halves, if the incidents as required by Lord Coke still obtain. Lord Coke required that the devisee of the particular estate to be enlarged should keep it until after the increase actually occurred, in order to preserve the privity between the testator and devisee. In *Faris v. Ewing*, John continued to hold his life estate until after the birth of the plaintiff, so that this incident was fulfilled; but Mollie conveyed before any child was born with the result that her life estate cannot be enlarged into a fee thereafter, if the dictum of Lord Coke, approved by Fearne, Cruise, Preston and Sheppard is to be followed. Privity was required because of the nature of conveyancing at common law. If this requirement is to be abandoned it must be justified by the change in the methods of conveyance.

But if the Missouri court is to apply this principle of enlarging estates it owes it to the profession to clearly define it. Is it the common law principle applied by Lord Coke in *Lord Stafford's Case*, or is it some new principle? If a particular estate is liable to be enlarged, may it be followed by a vested remainder? Or must any limitation thereafter be contingent? These questions cannot be answered from the Missouri cases and authorities elsewhere are very meager.

MANLEY O. HUDSON

ESTATES—LIFE ESTATE OR FEE SIMPLE—VALIDITY OF EXECUTORY LIMITATION AFTER A FEE. *Middleton v. Dudding*¹—This case involved the construction of a devise of land to the testator's wife Annie "as her absolute property", with a proviso in the codicil that "should Annie die without a will or having disposed of the property" it should go over to the plaintiffs in the action. Annie died intestate and without having disposed of the land. In Division One, RALEY, C., was of the opinion that Annie took a life estate with power of disposal of the fee by will or deed, and that the gift over took effect as a remainder; but this view was not taken by the court which in an opinion by BOND, J., held that Annie took the fee, that the words in the codicil were not strong enough to cut it down, and that the gift over on a failure to exercise the power of disposal was void. This view was taken by all of the court *en banc* except WOODSON, C. J.,

18. (1907) 206 Mo. 208. For a criticism of *Sheppard v. Fisher*, see 3 Law Series, Missouri Bulletin, p. 14; 11 Law Series, Missouri Bulletin, p. 21. In the latter comment, in note 84, it is erroneously stated that the enlargement of estates as described by Coke seems to have been no more than an application of the law of merger.

1. (1916) 183 S. W. 448.

who approved the opinion of RALEY, C., and went much further in the application of the statute directing courts "concerned in the execution of will" to have due regard to testators' intent and directions.²

In the last number of the Law Series the writer attempted a complete survey of the subject of executory limitations in Missouri law and made a special study of limitations after a fee in the event of a non-exercise of an added power of disposal. The protest there made against the principle that any limitation after a fee simple with added power of disposal is void, has been more than justified by the principal case; and the bad effect of that principle in causing such division on the question of whether the first taker has a fee or a life estate is nowhere better exemplified. It is most unfortunate that the court applied the principle in this case, without any clear statement of it and without any discussion of the reason for it.

If the testator's wife took a life estate under the will the gift over is of a valid remainder; if she took a fee the gift over is void as a remainder because of the impossibility of limiting a remainder after a fee, and void as an executory devise because of the indefensible rule noted above and applied by the Missouri court in *Green v. Sutton*,³ *Cornwell v. Wulff*,⁴ and *Roth v. Rauschenbusch*.⁵ The whole contest raged around the preliminary question whether a life estate or a fee simple was conferred on the first taker. Since the decision of *Walton v. Drumtra*,⁶ overruling *Cornwell v. Wulff*,⁷ and the opinion in *Gibson v. Gibson*,⁸ it should have been supposed that every effort would be made to find that a life estate had been conferred on the first taker in order to escape the frustration of intention consequent on the application of the principle that if the first taker is given a fee with added power of disposal the gift over is void. The opinion of RALEY, C., justified this expectation. But the opinion of BOND, J., revives the uncertainty prevailing at the time the Cornwell cases were decided, and it seems clear that the court will not longer shrink from finding that the first taker has a fee even tho it involves the invalidity of the gift over. But this ought to be more clearly stated by the court, which owes it to the profession to give some justification for the principle which it has here applied without even so much as a statement of it.

Some passages in the opinion of BOND, J., are indeed surprising. For instance, "The unlimited power to convey or will away property are the essential attributes of an estate in fee. To concede the right

2. Revised Statutes 1909, § 583, first enacted in 1815, 1 Missouri Territorial Laws, p. 411.

3. (1872) 50 Mo. 186.

4. (1898) 148 Mo. 542. See also *Cornwell v. Orton* (1894) 126 Mo. 355.

5. (1903) 173 Mo. 582. See also *Young v. Robinson* (1906) 122 Mo. App. 187.

6. (1899) 152 Mo. 489.

7. (1898) 148 Mo. 542.

8. (1911) 239 Mo. 490.

in a grantee to exercise these functions is to concede a fee simple in such grantee." Surely these words cannot be read literally for it has so often been held that the addition of a power of disposal does not convert a life estate into a fee,⁹ that it would now seem beyond question. Again, Judge BOND says that the testator "attempted to make a double devise of the fee. It is too clear for elaboration that this can never be done." This amounts to saying that no executory limitation after a fee is valid, whether by way or springing or shifting use. The writer has attempted to show in the last number of the Law Series¹⁰ that executory limitations following fees simple have a secure place in Missouri law since *Sullivan v. Garesche*¹¹ and certainly springing executory interests are secure since *O'Day v. Meadows*.¹² The dicta in *Simmons v. Cabanne*¹³ are out of consonance with all the modern cases. Judge BOND himself in *Brown v. Tuschoff*¹⁴ in *Buckner v. Buckner*¹⁵ recognized the validity of executory limitations after fees simple. Judge WOODSON pointed out this error of Judge BOND's by saying that "even at common law, under the doctrine of contingent remainders, executory devises and springing and shifting uses, a fee upon a fee, or any lesser estate, could be granted thereafter." But it is submitted that this, too, is error, if it means that a contingent remainder can be limited after a fee.

Another suggestion of Judge WOODSON's is pregnant with interesting consequences. He says that the statute¹⁶ was "designed to do away with the necessity of resorting to the children of executory devices [devises] and springing and shifting uses in order to cut down a fee given to the first devisee and to give a remainder over upon the happening of a contingency stated in the will cutting down the fee in the first taker." The position seems to be that the statute enjoining regard to the testator's intention in the execution of a will abrogated all rules of law which might defeat intention. This would afford relief from the artificial rule that a fee with added power of disposal cannot be followed by a gift over, and such relief may in some future decision come this way. Some passages in *Gibson v. Gibson*¹⁷ seem to indicate the same idea. But such a construction of the statute was not hinted at in the century of its application,¹⁸ until *Gibson v. Gibson*. And if the construction be sound, it would have enabled

9. *Gregory v. Cowgill* (1854) 19 Mo. 415; *Lewis v. Pitman* 101 Mo. 281; *Garland v. Smith* (1901) 164 Mo. 1.

10. 11 Law Series, Missouri Bulletin 3.

11. (1910) 229 Mo. 496.

12. (1905) 194 Mo. 588.

13. (1908) 177 Mo. 336.

14. (1911) 235 Mo. 449.

15. (1918) 255 Mo. 371.

16. The Chief Justice seems to have been referring to Revised Statutes 1909, § 579, but he must have had in mind § 583.

17. (1911) 239 Mo. 490.

18. Revised Statutes 1909, § 583 was first enacted in 1815.

the courts to abandon the rule in *Shelley's Case* and the common law meaning of "die without issue" without statutory authority. It may well be argued that it would also have abrogated the rule against perpetuities. The statute was first enacted in 1815, one year before the adoption of the common law in Missouri, and it would seem that such a general enactment concerning testators' intentions should not prevent the recognition of well defined principles even tho they may defeat testators' intentions, such as the rule against perpetuities for instance. Judge Woodson's position would mean that any future limitation is to be effectuated and that the statute has abolished all differences between contingent remainders and executory devises. The *Buckner v. Buckner* seems to give color of soundness to this position, it seems improbable that such a revolution has been actually effected.

Counsel in *Middleton v. Dudding* made the mistake of not contending for an abandonment of the rule that any limitation after a fee with added power of disposal is void, as applied in *Green v. Sutton*, *Cornwell v. Wulff* and apparently in *Roth v. Rauschenbusch*.¹⁹ Until that rule is abandoned, there can be no end to the litigation on the question whether the first taker has a life estate or a fee. *Middleton v. Dudding* revives the uncertainty which since *Walton v. Drumtra* and *Gibson v. Gibson* was diminishing. No one should be content with any opinion on such a will as that involved in *Middleton v. Dudding* until the highest court has expressed itself—it seems really a situation for the last guess of the Supreme Court, for it must be admitted that since most testators will not stop to weigh these niceties it is the supposed and not the actual intention which is to be found. Every such will must therefore be taken to the Supreme Court, with the result of further congesting its already overcrowded docket. This must continue until the abandonment of a rule for which no attempt at justification has been made in the numerous opinions dealing with it.

MANLEY O. HUDSON

FIXTURES—EFFECT OF ANNEXATION BY LESSOR FOR USE OF LESSEE. *Cunningham v. Von Mayes*¹—The federal government leased a store building in Caruthersville for ten years for use as a post office. In compliance with a stipulation in the lease, the lessor equipped the building with post-office furniture and cabinets and tables. Some of the cabinets were fastened to the ceiling by braces and to the floor by nails and screws and served as a partition between the space in which the mail was worked and the part which was open to the public. A judgment creditor of the lessor caused execution to be levied on the realty and it was sold to the plaintiff, subject to the lessee's term;

19. For the basis for such a contention, see 11 Law Series, Missouri Bulletin, p. 87 et seq.

1. (1916) 182 S. W. 1059.

another judgment creditor caused execution to be levied on the post office furniture and fixtures as the personal property of the lessor and they were about to be sold when the plaintiff filed his bill against the sheriff and the execution creditor to enjoin such sale. The Springfield Court of Appeals affirmed the trial court's refusal to enjoin the sale, on the ground that the post office fixtures had not become a part of the realty but had retained their character as personalty.

The Missouri courts have frequently approved the three-fold test for determining whether a chattel has become a fixture: (1) actual annexation to the realty or something appurtenant thereto; (2) adaptability to the use of the realty to which it is annexed; (3) intention that the annexed chattel shall be a permanent accession to the land, such intention "being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation and the purpose, the use for which the annexation has been made." This test was applied in the leading Missouri case of *Rogers v. Crow*,² in which an organ affixed by only a few nails to the floor of an alcove in a church was held to be a part of the realty.

Applying this test to the present case it would seem that the articles were actually annexed to the realty; that they were adapted to the uses of the realty; and that an intention of permanency can be reasonably inferred. The suggestion of the court that the annexation might have been for the purpose of steadying the cabinets seems untenable in view of the fact that post offices generally follow this plan to secure greater convenience for the delivery of mail and also to give security and protection to the mail and articles of value within the distributing room; the annexation was also to secure permanency to the cabinets as a partition. In *Williams v. Lane*³ shelves put in a building used by a tenant as a store room, passed to the vendee as fixtures. In *Cohen v. Kyler*,⁴ a bath tub and two sinks nailed to the floor and walls were sufficiently annexed to be fixtures; so in *Sosmon v. Conlon*,⁵ stage scenery and fittings of standard size, hung by pulleys and ropes, which could be used in any standard theater. In *Thomas v. Davis*,⁶ HENRY, J., stated that "annexation must be permanent, tho slight, and it need not be such that if severed, such severance will involve the destruction, impairment or substantial injury of the freehold." Following that, the annexation by means of screws

2. (1867) 40 Mo. 91. See the comment on *American Clay Machinery Co. v. Sedalia Brick & Tile Co.* (1913) 174 Mo. App. 485, 180 S. W. 903, in 3 Law Series, Missouri Bulletin, p. 42.

3. (1895) 62 Mo. App. 66.

4. (1858) 27 Mo. 122.

5. (1894) 57 Mo. App. 25.

6. (1882) 76 Mo. 72, 78, cited in *Donnewald v. Turner Real Estate Co.* (1891) 44 Mo. App. 350.

and nails and braces to the floor and ceiling of the building was sufficient to give the partition with its component parts the character of realty.

The court in its opinion seemed to emphasize the facts that the building was being used only temporarily as a post office, that it was not constructed for a post office; that the post office fixtures were put in the building for the temporary use of the building as a post office; and that such fixtures could be easily removed without injury to the freehold; and that they probably would be so moved when the United States ceased to occupy the premises as a post office. In *Donnewald v. Turner Real Estate Co.*,⁷ it was contended that a boiler and engine placed in the basement by a tenant for use in manufacturing silverware, were not fixtures "because the evidence tended to show that the annexation was for a mere temporary purpose, and not for the permanent and substantial improvement of the building itself," but the court held the annexation sufficient. If this is true where the tenant made the annexation for his own use, it ought to be equally as true when the annexation is made by the owner of the realty for the use of a tenant. It seems immaterial that the building was not originally designed for a post office, inasmuch as the fixtures in question were adapted for its use as such.

The court distinguished this case from *Crane v. Construction Co.*,⁸ *St. Louis Radiator Co. v. Carroll*,⁹ and *Sosmon v. Conlon*, in which the fire hose screwed on to the permanent stand pipe, the stage scenery hung by pulleys and ropes in a theater, and the hot water radiators connected with pipes from a boiler in the basement, were a part of the architectural design of the building. That the article fits into the architectural design is important in determining a fixture only when there is constructive or slight annexation as in *Rogers v. Crow*, and *Sosmon v. Conlon*. In the present case we have actual, physical, and permanent annexation for a permanent purpose; and it seems of little importance that the building was a general store room and could be used for other purposes. If it had been used as a grocery store, the counters and shelves would have become fixtures; if as a saloon, the bar would have passed with the realty; and if as a drug store, the show cases, prescription cases, and shelves would have become fixtures.

It is common for such articles, prepared in the factory, to become a part of the realty, by being placed in and annexed to a general store room similar to this one. The uses to which the store room may be put are many, but the articles adapted to present use become a part

7. (1891) 44 Mo. App. 350, 353, 354.

8. (1906) 121 Mo. App. 209.

9. (1897) 72 Mo. App. 315.

of the building whether it be for a saloon, a drug store, a clothing store, a book store, or a general store room.¹⁰

The fact was emphasized by the court that the United States is the only tenant that will use such fixtures, while fixtures used by one tenant in the drug business may be used by another tenant in the same business. A monopoly does not change the character of the articles used and the probability that an article will be used for a long period does not affect the character of the chattel annexed. The bars placed in a saloon licensed to run for only one year,¹¹ or the prescription cases and shelves placed in a drug store under a lease for one year¹² become fixtures notwithstanding the shortness of the period during which such articles are to be used. Permanency is determined by present facts and not by future probabilities.¹³ And it is of no importance in this case that the articles can be taken out without injury to the freehold, if the building be no longer used as a post office.¹⁴ It seems difficult to justify the principle case on the reasons which controlled previous decisions as to fixtures and the case may be the basis for future decisions that erections by lessors for the benefit of their tenants do not become realty.

ROSCOE E. HARPER

JUDGMENTS—WHEN IS THE SUPREME COURT EQUALLY DIVIDED, AND WHAT IS THE EFFECT? *Faris v. Ewing*¹—An action to try the title to certain land involved the construction of a will. In the trial court, judgment had been given for the defendants. Six judges sat in the case when it was heard by the Supreme Court. Two judges, WALKER and GRAVES, so construed the will that the plaintiff took no interest in the land, and they voted to affirm the judgment of the trial court; two judges, WOODSON and BLAIR, so construed the will that the plaintiff would take a vested fee simple in an undivided half of the land and a contingent remainder in fee in the other undivided half, and they voted to reverse the judgment; two judges, BOND and FARIS, so construed the

10. *Fixtures: Tabor v. Robinson* (N. Y., 1892) 36 Barbour 483 (counters, shelves and drawers); *Connor v. Squires* (1878) 50 Vt. 680 (drawers); *Rinzel v. Stumpf* (1903) 116 Wis. 287, 93 N. W. 36 (counters); *Barringer v. Evenson* (Wis. 1906) 106 N. W. 801 (prescription cases and shelves with glass doors in a drug store); *Woodham v. First National Bank* (Minn., 1892) 50 N. W. 1015 (bar in a saloon); *Smyth v. Sturgis* (1888) 108 N. Y. 495 (a lightly constructed and easily removable partition). *Trade Fixtures: Williams v. Lane* (1895) 62 Mo. App. 66 (shelves in a store room); *McCall v. Walter* (1883) 71 Ga. 287 (shelves and counters) *Roth v. Collins* (1899) 109 Iowa 501, 80 N. W. 543 (shelves and counters set up in sections in building leased for one year as a drug store); *Smusch v. Kohn* (1898) 49 N. Y. S. 176 (bevel glass cabinet partition and show case).

11. *Woodham v. First Nat'l. Bank of Crookston* (1892) 50 N. W. (Minn.) 1015.

12. *Roth v. Collins* (1899) 109 Iowa 501, 80 N. W. 543.

13. *State v. Marshall* (1877) 4 Mo. App. 29.

14. *Thomas v. Davis* (1882) 76 Mo. 72; *State v. Marshall* (1874) 4 Mo. App. 29; *Donnewald v. Turner Real Estate Co.* (1891) 44 Mo. App. 350; *Cohen v. Kyler* (1858) 27 Mo. 122.

1. (1916) 183 S. W. 280.

will that the plaintiff would take a contingent remainder in an undivided half of the land and they too voted for a reversal. In this situation, the court stated that a judgment could not be entered, and "for the purpose of reaching a judgment in this much litigated case" but still adhering to their views as expressed, *WALKER and GRAVES, JJ.*, consented to a judgment that one half of the property be vested in the defendant absolutely and to this extent they concurred with *BOND and FARIS, JJ.*

This presents an interesting question of the effect of a divided court. If the six judges had divided three to three on whether the judgment of the trial court should be affirmed or reversed, the proper course apart from constitutional restriction would have been to affirm the judgment below.² Such an affirmance is called an "affirmance of necessity."² But the Constitution has prescribed that "when the judges sitting shall be equally divided in opinion, no judgment shall be entered based on such a division," but that "some person learned in the law" shall be called in to assist in a decision.³ If the division in the principal case had been three to three the constitutional provision would have made it incumbent on the court to call in an outsider.⁴ But would the constitutional provision apply if the division among six judges is into three sets of two each? Such a division is quite probable in an action to try title under the statute.⁵ The court would then be equally divided in opinion, but to call in one outsider would not help matters for it could not result in a majority vote for any of the three views. The Constitution does not provide for calling in more than one person for the provision was clearly phrased with reference to a division of the judges into two sets, and the words are, "some person" who is to sit as "one of the judges". But the Constitution forbids the court's entering any judgment in case of equal division, and it is submitted that in such case there is no course open but to dismiss the appeal (possibly without going thru the farce of calling in an outsider) with the result that the judgment of the lower court will stand as the final disposition of the case, tho it should be noted that this is not an affirmance of necessity.

As the court summed up the opinions in *Faris v. Ewing*, the situation would seem to have called for a dismissal of the appeal in accordance with the foregoing; for it was said in the *per curiam* opinion that

2. See *Dubuque v. Illinois Central Railroad Co.* (1874) 39 Iowa 56; *Durant v. Essex County* (1868) 7 Wall. 108. See also William Green, *Stare Decisis*, 14 American Law Review 630. In earlier times, it was the rule that if an appellate court was evenly divided, no judgment could be entered. *Proctor's Case* (1614) 12 Co. 118. The rule is now well settled otherwise. *Gourley v. Insurance Co.* (Mich. 1915) 155 N. W. 483. See 16 Columbia Law Review 352.

3. Constitution of 1875, Art. VI, § 11.

4. In the principal case, one judge who was not sitting might have come to the rescue.

5. Revised Statutes, 1909, § 2535.

two judges had held that the defendant was entitled to all the land in controversy; two that he was entitled to but one half of it; and two that the plaintiff was entitled to all of it. This would seem to be a clear case of equal division, and on this view the judgment of the lower court should not have been reversed. But there is nothing in the report to indicate that the court's attention was directed to the possible application of the constitutional provision.

It seems clear that the effect of the various opinions was not properly stated in the *per curiam* opinion. The first two judges clearly thought that the plaintiff was entitled to none of the land; of the other four, two gave the plaintiff a vested fee in the undivided half devised to the plaintiff's father and two gave her nothing in it, but all the four were agreed that the plaintiff had a contingent remainder in fee in the undivided half previously devised to the defendant's wife. As to this contingent remainder then, there was enough agreement to warrant a judgment. But as to the undivided half previously devised to the plaintiff's father, the first two and the last two judges agreed that the title was in the defendant, so that judgment could be given to this effect. No reason is perceived why the two halves should not be dealt with separately and the judgment should therefore have been that the defendant had good title to the undivided half formerly devised to the plaintiff's father, and that the plaintiff had a contingent remainder in fee to the undivided half formerly devised to the defendant's wife. This seems to have been the court's disposition of the case, tho it is not clear but that the plaintiff and the defendant might in accordance with the *per curiam* opinion each be adjudged to have title to an undivided one-half of the land; it seems difficult to justify the inconclusiveness of the judgment which may call for further litigation. Properly interpreted, the result of the case may be explained without any swerving from the opinions expressed. But the *per curiam* opinion gives appearance to a compromise in that two judges emphasized that their concurrence was solely for the purpose of permitting a judgment. If this were true, it is submitted that the Constitution would have required a different course to be pursued, as outlined above.

MANLEY O. HUDSON

MARRIAGE—REQUISITES OF COMMON LAW MARRIAGE. *State v. Rotter*.¹ *State v. Burkrey*.²—In 1881 an act was passed by the Missouri legislature providing that "previous to any marriage in this state, a license for that purpose shall be obtained from the officer herein authorized to issue the same."³ Prior to this act common law marriages were rec-

1. (Mo., 1916) 181 S. W. 1158.

2. (Mo., 1916) 183 S. W. 328.

3. Laws of 1881, p. 161; Revised Statutes 1909, § 8283.

ognized in this state and they continued to be legal after the passage of the act,⁴ since the statute does not declare that common law marriages shall be void.

In general, it seems that any one who may contract a common law marriage may also contract a statutory marriage. There is, however, one exception. The age of consent at common law is twelve and fourteen years respectively for female and male. On arriving at these ages either may enter into a valid common law marriage without the consent of the parent or guardian.⁵ But no male under twenty one years of age or female under eighteen years can procure a license to be married unless he or she has the consent of the parent or guardian.⁶

All that is necessary to constitute a common law marriage is a contract *per verba de praesenti* by which a man and a woman capable in law of consenting agree and consent to take each other as husband and wife, intending that "such contract is then and there to produce the status." Nothing further, such as cohabitation⁷ or solemnization,⁸ is required to consummate the marriage. A contract *per verba de futuro* does not constitute marriage; it is only a contract to marry and requires the relation to be entered into. So if there is a contract of marriage, *per verba de futuro* and cohabitation is had on faith of that contract, the marriage is consummated.⁹

It is necessary to distinguish between the facts which create a common law marriage and those which only raise a presumption of it. Circumstances which ordinarily result from marriage, such as cohabitation, acknowledgment and general reputation that the man and woman living together are husband and wife, raise a rebuttable presumption that the usual cause of these facts, namely marriage, exists, because the law presumes innocence and not guilt.¹⁰ If, however, the reputation is spasmodic, that is, not general in the community where the man and woman resided, or if reputation or cohabitation are lacking, the other facts are too weak to raise a presumption of marriage.¹¹ But when all these facts are present, a presumption of marriage does not always arise. No presumption of common law marriage arises from any relation between a white man and negro woman, because such marriages are by statute illegal and absolutely void.¹² In a prosecution for bigamy or adultery, a common law marriage must be proved in fact, and

4. *State v. Bittick* (1890) 103 Mo. 183, 15 S. W. 325; *Bishop v. Brittain Inv. Co.* (1910) 229 Mo. 699, 129 S. W. 668.

5. *State v. Bittick* (1890) 103 Mo. 183, 15 S. W. 325.

6. Revised Statutes 1909, § 8289.

7. *Davis v. Stouffer* (1908) 132 Mo. App. 555, 112 S. W. 282.

8. *Dyer v. Brannock* (1877) 66 Mo. 391.

9. See *Davis v. Stouffer* (1908) 132 Mo. App. 555, 112 S. W. 282.

10. *Cargile v. Wood* (1876) 63 Mo. 501; *Adair v. Mette* (1900) 156 Mo. 496; 57 S. W. 551; *Imboden v. Trust Co.* (1904) 111 Mo. App. 220, 86 S.

11. *Bishop v. Brittain Inv. Co.* (1910) 229 Mo. 669, 129 S. W. 668.

12. See *Keen v. Keen* (1904) 184 Mo. 358, 83 S. W. 526; Revised Statutes 1909, § 8280.

W. 263; *Plattner v. Plattner* (1905) 116 Mo. App. 405, 91 S. W. 457.

no presumption arises from cohabitation, acknowledgment and reputation tho these facts may be some evidence of marriage.¹³ Furthermore, the common law marriage must be contracted and the cohabitation as man and wife had in a state where such marriages are recognized before it will be considered a valid marriage in this state.¹⁴

State v. Rotter presents a nice question in this connection. In 1902 the prosecuting witness married the defendant and lived with him until 1905 when she discovered that the defendant had a wife by a former marriage still living. The defendant then proposed, "Well, if it is so [referring to the prior marriage] it will be all over with, and you and I will live together as husband and wife." The prosecuting witness assented to this. A few months later the defendant obtained a divorce from his first wife and he thereafter continued to cohabit with the prosecuting witness as her husband for five years. He acknowledged her as his wife and they were reputed to be husband and wife. In 1910, the defendant abandoned her and the prosecution is for this abandonment. The court held that a common law marriage existed between prosecuting witness and defendant: the decision went on the ground that the defendant's proposal was a continuing one and that the prosecuting witness accepted after the divorce. But she did not expressly accept after the divorce and it is hard to find any acceptance at all on her part after the divorce unless the continuance of marriage relations which she had been holding with the defendant constituted an acceptance. But in *Topper v. Perry*,¹⁵ it had been held that mere consent by the woman to hold marriage relations with the man on his assertion that the woman was his wife without any promise on her part to take him as her husband, did not constitute a common law marriage. But the decision in *State v. Rotter* can be sustained on two other grounds. Altho the contract did not create a present status of marriage, it can be regarded as an executory contract to marry or a contract of marriage *per verba de futuro*. The *bona fide* holding of marriage relations by defendant and the prosecuting witness after the divorce was granted, can be regarded as consummating their contract to marry. This is in accord with the holding in *Davis v. Stouffer*.¹⁶ The decision can also be rested on the ground that subsequently to the divorce the defendant and the prosecuting witness cohabited as husband and wife, they so recognized each other, and they were so reputed. So notwithstanding the invalidity of their prior contract of marriage as a contract *per verba de praesenti*, these latter facts raise

13. *State v. Cooper* (1890) 103 Mo. 266, 15 S. W. 327; *State v. St. John* (1902) 94 Mo. App. 229, 68 S. W. 874.

14. *Jordan v. Telephone Co.* (1908) 136 Mo. App. 192, 116 S. W. 482.

15. (1906) 197 Mo. 531, 95 S. W. 203.

16. (1908) 132 Mo. App. 555, 112 S. W. 282. 2

a presumption of marriage¹⁷ which does not appear to have been rebutted.

In *State v. Burkrey*, it was held to be "necessary that the contract of common law marriage should be followed by a general and full recognition by each of the other as husband and wife." *Bishop v. Brittan Inv. Co.*,¹⁸ cited as sustaining this proposition, does not decide this point for the passage quoted from that case had to do with recognition not as a necessary element in addition to the contract in establishing marriage, but only as an element in raising a presumption of marriage when the actual contract cannot be proved on account of the incompetency of a witness. If nothing more is meant by the word "recognition" than "that by the contract the parties have become and are married for the purpose of assuming and carrying out the marriage relation,"¹⁹ the case is supported by *Davis v. Stouffer*. But if the court means by recognition that there must be acknowledgment and repute, it is submitted that the case is *contra* to *Davis v. Stouffer* and is not sustained by the holding in any other Missouri case.

GARDNER SMITH

17. *Rose v. Clark* (1841) 8 N. Y. Ch. Rep. 578; *Blanchard v. Lambert* (1876) 43 Iowa 228.

18. (1910) 229 Mo. 669, 129 S. W. 668.

19. *Davis v. Stouffer* (1908) 182 Mo. App. 555, 112 S. W. 282; *Caroy v. Hulett* (1896) 66 Minn. 327, 69 N. W. 31.

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THE PROPOSED REGULATION OF MISSOURI PROCEDURE BY RULES OF COURT

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CERTIORARI FROM THE MISSOURI SUPREME COURT TO THE COURTS OF APPEALS

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NOTES ON RECENT MISSOURI CASES



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This number of the Law Series should be cited as *13 Law Series, Missouri Bulletin*. Subjects of articles in previous numbers will be found listed in the back of this number.

The Proposed Regulation of Missouri Procedure by Rules of Court¹

At the 1915 meeting of the Missouri Bar Association, the committee² on judicial administration and legal procedure recommended "that the matter of making rules for the government of civil practice in the trial courts be delegated to the Supreme Court."³ A similar recommendation was made by the committee on judicial administration and remedial procedure in 1912,⁴ and by a special committee on judicial administration and legal procedure in 1913.⁵ The proposal was approved by the Missouri Bar Association in 1913 after a long debate, and it was vigorously advocated by the president of the Association in his annual address in 1914.⁶ To lawyers now long accustomed to the regulation of the minutest details of judicial procedure by statute, the proposal may seem somewhat radical, but the history of procedure in Missouri would seem to show that it would only enlarge a power which the courts have long exercised.

1. This study was prepared for submission to the Missouri Bar Association's special committee on legislation and remedial procedure, appointed in 1915. Liberal use has been made of the 1915 Report of the New York Board of Statutory Consolidation, and the excellent articles by Dean Roscoe Pound, in 10 *Illinois Law Review* 163 and 2 *American Bar Association Journal* 46.

2. Composed of Charles B. Faris, Samuel Davis, John F. Lee, W. O. Thomas and R. F. Walker. It is notable that this committee included two judges of the Supreme Court and two judges of circuit courts.

3. 1915 Report of the Missouri Bar Association, p. 57.

4. 1912 Report of the Missouri Bar Association, p. 51. The committee consisted of P. Taylor Bryan, J. M. Johnson and John D. Lawson. Mr. Bryan's argument was printed in 75 *Central Law Journal* 168.

5. 1913 Report of the Missouri Bar Association, p. 26. The Committee consisted of F. W. Lehmann, Arch B. Davis, Homer B. Hall and Rees Turpin. Mr. George Robertson did not join in the committee's report.

6. See the presidential address of Edward J. White in 1914 Report of the Missouri Bar Association, p. 60.

HISTORY OF PROCEDURE IN MISSOURI

When the first general court of Missouri was organized in 1804, a statute conferred upon it the "power to direct the writs, summons, process, forms and modes of proceedings to be issued, observed and pursued by the said court."⁷ In 1807, a statute of seventy sections established various Missouri courts and provided in general outline for the practice at law. This statute was amended in 1808, and in 1810 a statute of twenty-four sections provided for the practice in chancery. In 1822 a more elaborate statute for practice at law was enacted but it was repealed and superseded by the statute of 1825.⁸ None of these statutes, however, purported to deal with pleading and procedure and during this entire period the courts of Missouri necessarily followed the common law rules of pleading and practice. The various courts were forced to supplement the statutory regulation with rules of their own. The Supreme Court had the power to "direct the form of writs and process, not being contrary to or inconsistent with the laws in force for the time being,"⁹ and ever since the constitution of 1820 was adopted the Supreme Court of Missouri has been invested with "general superintending control over all inferior courts of law."¹⁰ It was probably in pursuance of this power that in the early case of *Risher v. Thomas*¹¹ the judgment of a trial court was reversed by the Supreme Court because the trial court had exacted compliance with one of its rules which had not been given due publicity.

The General Assembly did not purport to exercise complete jurisdiction over the field of pleading and procedure until 1849, when it promulgated a comprehensive detailed code of procedure of more than two hundred sections,¹² similar to the Field Code

7. 1 Missouri Territorial Laws, p. 55. Missouri was then a part of the territory of Louisiana.

8. Revised Statutes 1825, p. 620.

9. Revised Statutes 1825, p. 268.

10. Constitution of 1820, art. V, § 3; Constitution of 1865, art. VI, § 3; Constitution of 1875, art. VI, § 3.

11. (1828) 2 Mo. 98.

12. Laws of 1849, p. 78.

adopted in New York in 1848. Since 1849 the regulation of court procedure has been very largely in the hands of the General Assembly, but the statutory code has at all times needed supplementing by rules of court and it has never been deemed incompetent for a court to make its own rules supplementing the rules prescribed by the legislature. In *Brooks v. Russell*,¹³ the Supreme Court said that the authority of a trial court "to adopt any rule of practice not in conflict with the law cannot be questioned," and this statement has often been repeated in the Missouri reports.¹⁴ Furthermore, the Supreme Court has always possessed control of its own practice by rules of court promulgated in addition to the statutory rules. In a very recent case¹⁵ the Supreme Court speaks of this as one of its inherent powers. This power of each of the appellate courts to adopt rules of court for itself is recognized by statute,¹⁶ and the legislature has made it the special duty of every judge of a court of record "to prescribe rules that will procure uniformity, regularity and accuracy in the transaction of the business of the court."¹⁷ The Supreme Court has at all times subjected the rules of itself and of all other courts to conformity with statutes, and it seems to have reserved to itself the right to pass on the propriety of any rule of any other court.

Prior to 1849 common law pleading and procedure were in vogue in all of the trial courts in Missouri. It should be kept in mind that the rules of common law pleading and procedure were largely the result of rules which the English courts had laid down for their own guidance; some of them were due to orders promulgated by the courts themselves, some were due to the growth of precedent thru long lines of judicial decisions. The English Parliament had in some cases exercised a jurisdiction over matters of procedure in the English courts but for the most part the details had been left with the courts themselves.

13. (1864) 34 Mo. 474.

14. See *Johnson v. St. Louis, etc. R. R. Co.* (1891) 48 Mo. App. 630; *Pelz v. Bollinger* (1903) 180 Mo. 252.

15. *State ex rel. Logan v. Ellison* (1916) 184 S. W. 963.

16. Revised Statutes 1909, § 2049.

17. Revised Statutes 1909, § 3859.

The Court of King's Bench was independent of the Court of Common Pleas and of the Exchequer. Each of the three made its own rules and in such a treatise on practice as Tidd's, which was the standard work on English practice during the early history of Missouri, the rules of court occupy a very large place. Tidd prefaces his treatise with a chronological table of the rules and orders of English courts,¹⁸ and these rules occupied a place in the English practice quite as important as the statutes of Parliament. Some of these rules, in force in the English courts when early Missouri procedure was fashioned on the English procedure, date as far back as the year 1457 in the reign of Henry VI and many of them go back of the year 1607 in the reign of James I, which was the date of the common law as it was formally adopted in Missouri in 1816. Prior to 1849, therefore, the Missouri courts must have possessed the same control of rules of procedure as was exercised by the English courts and tho the legislature did not entirely abjure the field of procedure, it did not purport to deal with details and these must have been in the control of the courts themselves. Nor were the courts deprived of this power by the code of 1849, for it has been universally admitted since that time that each court may deal with the details of its procedure which have not been covered by the existing code. Indeed, if the courts have an inherent power to make rules, they could not be altogether deprived of it by statute.

DISADVANTAGES OF THE STATUTORY CODE

Comprehensive and detailed regulation of court procedure by the legislature is subject to numerous objections.

18. 1 Tidd, *Practice* (3d Amer. ed.) XXXV. See also the table of *regulae generales* printed in 1 Chitty, *Pleading* (14th Amer. ed.) 726. Edward Jenks, in his *Short History of English Law*, p. 188, says that these rules go back "for a long period in English legal history, and it is impossible without further research into the archives of the fourteenth century, to state definitely when they began.... While the known Chancery Orders go back to 1388, the oldest Common Law Rules date only from 1457; but the oldest of these latter refers clearly to still older Rules, which seem to have disappeared. The oldest published Rules of the King's Bench appear to be of 1604, but it is more than probable that these are not in fact the first made. The oldest Exchequer Rules known to the writer date from 1571."

First, while the courts are responsible in the eyes of the public for their administration of justice, they are frequently powerless to prevent a miscarriage of justice because of the necessity of applying the rules of procedure which the legislature has prescribed.¹⁹

Second, the control of the details of procedure is now in the hands of legislators many of whom are not lawyers and have had little experience with court procedure.²⁰ The session of the legislature is so crowded with the numerous subjects to be considered and the work of legislation must of necessity be so hurried that there is frequently little time for a thoro consideration of the changes suggested.

Third, with the legislature meeting biennially, changes can now be made in court procedure only during the biennial sessions. They cannot be brought to the attention of a body that has the power to change them as they are discovered. Frequently, several sessions of the legislature elapse before a change generally recognized to be needed can be effected. Since no perfect system of procedure can ever be devised, a system should be judged not by the degree to which it approaches perfection so much as by its susceptibility to being made more nearly perfect.

Fourth, the statutory rules of procedure bind the courts with too much rigor. Tho the statute may be liberally construed, it cannot be defeated and it ought not to be materially changed by judicial decisions. It must be applied by the court tho it works manifest injustice and it can never be suspended or modified so as to meet situations unforeseen at the time of its formulation.

Fifth, the courts have no latitude in the interpretation of the statutory prescribed rules, but must await cases in which questions of construction are actually involved. The consequence is that our court reports are now full of decisions as to matters of pro-

19. The notorious decision of the Supreme Court in *State v. Campbell* (1907) 210 Mo. 202, in which an indictment was held defective because it concluded with the words "against the peace and dignity of State," whereas the Constitution required the conclusion to be "against the peace and dignity of the State," is a frightful example of the effect of binding courts with detailed forms.

20. Of 176 members of the Missouri General Assembly of 1915, only 57 were lawyers.

cedure which turn on technical questions of statutory construction, and statutes enacted for the dispatch of business are not infrequently applied as tho they were enacted for the protection of substantive rights.

Sixth, legislators and lawyers with legislative influence have sometimes secured amendments to the code which will meet individual cases in which they are interested and which they cannot frankly defend as general rules which will facilitate the administration of justice. Statutes prescribing rules of procedure may be the result of legislative trading and log rolling.

ADVANTAGES OF THE PROPOSED CHANGE

If the control of court procedure be left to the courts themselves, as is proposed, many of the evils of the present system would be obviated.

First, the Supreme Court, as the head of our judicial system, would be enabled to discharge the responsibility which it already has in the eyes of the public and to conform judicial procedure to the varied and changing needs of litigants.

Second, the control of details of court procedure calls for the exercise of expert knowledge. Instead of having this control in the hands of men who have had no experience with courts, it would be in the hands of men who are in a position best to judge the effect of the rules which they promulgate. Changes suggested would receive more careful attention than they would receive in the legislature. Quoting a recent president of the Missouri Bar Association, "the best results can be derived, in the matter of court procedure, from utilizing, rather than ignoring, the genius, ability, study, experience and knowledge of the judges and lawyers who are most nearly concerned in the procedure of the courts."²¹

21. Edward J. White, Esq., in the 1914 Report of the Missouri Bar Association, p. 62.

Mr. Samuel Rosenbaum, who has made a careful study of English procedure, says of the Rule Committee in England that it "is not only more accessible than a legislature, but more reasonable, more learned in the law, and more ready to act when the need is shown." 63 Pennsylvania Law Review 111.

Third, it would be possible to make changes in rules of procedure at any time by appealing to the court which has power to change them. This court would undoubtedly call upon the members of the bar for guidance and might refer all suggestions to a committee of the bar, but it would be open to entertain suggestions as to changes at least nine months in each year. The Supreme Court of the United States did not make frequent changes in its equity rules between 1842 and 1913—only eight in all; but it must be remembered that no organized demand for changes was made by the bar during that period.

Fourth, a rule of court may be suspended by the court which promulgates it;²² or if its operation in a particular case is shown to work injustice, the rule may be changed on the spot so as to prevent injustice in the particular case and in similar cases.²³

Fifth, it may be expected that the judges would be more responsive to necessary changes in practice than the legislature would be, and that the members of the bar could exert a more direct influence in securing necessary changes. Experience in England seems to justify this expectation.

Sixth, court rules would discourage reliance on technical questions of procedure to defeat substantive rights. The rules made by the courts would be interpreted by the courts with a view to accomplishing the result for which they were intended,

22. In *In re Coles* (1907) 1 K. B. 1, 4, the Master of the Rolls said that "the relation of rules of practice to the work of justice is intended to be that of handmaid rather than of mistress, and the court ought not to be so far bound and tied by rules, which are after all intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case." Accord, *Omaha Electric Light Co. v. Omaha* (1914) 216 Fed. 848. But in the recent opinion of FARIS, J., in *Hermann Savings Bank v. Kropp* (1915) 181 S. W. 86, it was said that a rule "made in aid of and under direct authority of a solemn statute has practically the binding force of a statute." The statement was in no way necessary to the decision and it has been criticised in 11 Law Series, Missouri Bulletin, p. 58. In *Kuh v. Garvin* (1894) 125 Mo. 546, it was said that "courts have control of their own rules and it rests very much in their discretion as to whether they shall be rigidly enforced or not."

23. The Supreme Court of the United States recently allowed a motion to be argued by the Attorney General of Missouri in spite of its general rule to the contrary. But a rule of court will not be given a retrospective operation. *Dalton v. Register* (1912) 248 Mo. 150.

viz., the facilitation of the work of the courts, and they would be at all times subject to change for this purpose.

Seventh, if the courts were permitted to exert a larger measure of control over their own practice and procedure, it would tend to enlarge general respect for the administration of justice and to elevate both bench and bar in the estimation of the public. Procedure is largely a matter of administration and to permit one department of the government to control the details of administration in another department of the government is to unduly elevate the one above the other.

Instead of being a radical innovation, the proposal seems to represent an effort to re-establish a power which courts formerly exercised but which has gradually been taken over by the legislature without satisfactory results. But it does not mean a return to the common law system under which procedure was controlled by judicial decisions and precedents, for it is proposed that all rules of procedure should be formally promulgated, as was not necessary in the earlier common law system.

DISADVANTAGES OF THE PROPOSED CHANGE

There seem to be few disadvantages in a system of procedure regulated by court rules which are not present to a larger degree in the existing system of regulation by statute. Any system is dependent, after all, on the character of the bar which uses it and on the willingness of the bar to make it serve the ends for which it was intended.

First, a changable procedure might be fruitful of contention and delay and might put on the courts the burden of constant interpretation. After the present judicature rules in England were promulgated, the English courts were called upon to hand down many decisions interpreting them; between 1875 and 1890 there were said to be four thousand such decisions in England.²⁴ But unless a complete change is made suddenly this result should not follow and after the change is effected it seems that there should be less litigation over the interpretation of court rules than over the interpretation of statutory rules.

24. Hepburn, History of Code Pleading, § 224 note.

Second, the protection of clients demands a system of procedure with which lawyers may readily be familiar. Unnecessary changes in procedure would work hardship on litigants, but the court which is invested with power to promulgate rules is of course readily responsive to the demands of the bar, and it would seem that the opinion of the bar in this regard would be respected.

Third, the success of a system of court rule procedure will demand a high degree of learning and prudence in the judiciary and stability in the office of judge. Every new judge can not carry out his own ideas of procedure by completely revolutionizing the rules which his predecessors have promulgated. But the personality of courts changes less frequently than the personality of legislatures and experience in the United States seems to justify the expectation that the courts will not be too hasty in changing their rules. Between 1842 and 1913 the Supreme Court of the United States made only eight changes in the federal equity rules.

Fourth, the duty of promulgating rules of procedure would be an added burden on courts which are already overworked, but much of the burden would be borne by bar associations and members of the bar self-appointed to make recommendations to the court. Furthermore, the court must be constantly devoting its attention to the working of any rules of procedure, and it would require little time to promulgate amendments as they may appear to be necessary.

IS THE PROPOSAL CONSTITUTIONAL?

When the special committee of the Missouri Bar Association recommended this change in 1913, one member of the committee made a separate report in which he stated that the proposal is unconstitutional, "in that it confers upon the Supreme Court a legislative power which is now vested solely in the General Assembly."²⁵ This opinion has been frequently expressed by members of the bar. In making his report in 1915, the chairman of

25. See the separate report of George Robertson, Esq., in the 1913 Report of the Missouri Bar Association, p. 129.

the committee on judicial administration and legal procedure, himself a judge of the Supreme Court expressed the "confident belief" that the constitution of Missouri would allow this change to be effected. Close examination would seem to justify his belief.

The separation of powers into executive, legislative and judicial is by no means a hard and fast division. Many functions partake of both a legislative and a judicial character and whether a particular function is legislative or judicial, or in some degree both, can only be determined with reference to the history of the exercise of that function. For when our constitutions made the separation of powers no precise definition was attempted and the history of the time must largely determine the effect of their work. The Missouri constitution of 1820 contained an article on the distribution of powers which provided that "the powers of government shall be divided into three distinct departments" and that none of these departments "shall exercise any power properly belonging to either of the others."²⁶ This article was continued in the constitution of 1865 and it is now a part of the constitution of 1875. In commenting on the difficulty in determining whether a particular power is to be exercised by the judicial or by the legislative department of the government, the Missouri Supreme Court said in *State ex rel. Lionberger v. Tolle*,²⁷ that the courts have been induced to adopt "very liberal views in determining where any power not easily classified may be properly lodged," and it quoted with approval the statement of the Ohio court, that "whether power in a given instance ought to be assigned to the judicial department is ordinarily determinable from the nature of the subject to which the power relates. In many instances, however, it may properly be assigned to either of the departments."²⁸ And in speaking of the power to make rules of court, it was said, "as it is essential to the proper administration of justice that the courts shall have power to supplement the rules of pleading and practice enacted by the legislature by such rules not inconsistent therewith as experience may

26. Constitution of 1820, art. III.

27. (1880) 71 Mo. 645.

28. *State v. Harmon* (1876) 31 Ohio St. 250.

from time to time demonstrate to be necessary to the proper exercise of their functions, the power to make such rules has always been upheld."

Any question as to the effect of the separation of powers in the present constitution must be determined with reference to the meaning of the same clause as it appeared in the constitution of 1820. At that time the procedure of English courts was largely controlled by rules of court and the English Parliament did not substantially interfere with the courts' control of common law procedure until the Act of 1833, in which the formulation of new rules of procedure by the courts was expressly authorized and which led to the promulgation of the Hilary Rules of 1834. Prior to 1820 therefore, the regulation of details of court procedure had for centuries been deemed a judicial function in England, tho there was no constitutional restriction which would have prevented Parliament's exercising the function at any time. Since Parliament did from time to time enact some statutes dealing with practice in a large way, the function might fairly be said to have been one which was both judicial and legislative in England, but it partook more of a judicial than of a legislative character. The English rules of court occupied a very large place in the procedure of English courts during the century prior to the adoption of the Missouri Constitution in 1820. Furthermore, while Missouri was a territory and until 1849, the Missouri courts actually did control the details of their own procedure and the legislature left these details to court control. It was not until 1849 that the legislature assumed the right to exercise this function. Its assumption cannot be said to be unconstitutional, however, in view of the fact that the function had been exercised to some extent by the British parliament and must be construed to be both legislative and judicial.

An analogy is to be found in the history of procedure in the federal courts. The Judiciary Act of 1789²⁹ and the Process Act of 1792³⁰ conferred on the federal courts large powers to control their own practice and to vary the rules which prevailed in the

29. 1 U. S. Statutes at Large, p. 83, § 17.

30. 1 U. S. Statutes at Large, p. 276, § 2.

state courts. It was contended in *Wayman v. Southard*³¹ that in these acts Congress had made an unconstitutional delegation of legislative power to the courts, and in upholding the delegation Chief Justice MARSHALL said: "The line has not been exactly drawn which separates those important subjects which must be regulated by the legislature itself from those of less interest in which a general provision may be made and power given to those who may act under those general provisions to fill up the details." "The seventeenth section of the Judiciary Act and the seventh section of the additional act empower the courts respectively to regulate their practice. It certainly will not be contended that this might not be done by Congress. The courts, for example may make rules directing the return of writs and processes, the filing of declarations and other pleadings and other things of the same description. It will not be contended that these things might not be done by the legislature without the intervention of the courts, yet it is not alleged that the power may not be conferred upon the judicial department." In *Bank of the United States v. Halstead*,³² Justice THOMPSON in delivering the judgment of the court said, "Congress might regulate the whole practice of the courts if it was deemed expedient so to do, but this power is vested in the courts and it has never occurred to anyone that it was a delegation of legislative power." The constitutional validity of the power given to the federal courts was also upheld by Justice STORY in *Beers v. Haughton*.³³ Furthermore, in 1792 the Supreme Court on motion of the Attorney General stated that "the court considers the practice of the courts of King's Bench and Chancery in England as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein as circumstances may make necessary."³⁴

In view of the courts' exercise of the power to regulate procedure by rules for the purpose of supplementing legislative codes of procedure, there can be no question but that the legislature might

31. (1825) 10 Wheaton 1.

32. (1825) 10 Wheaton 50.

33. (1835) 9 Peters 329.

34. 2 Dallas 411.

give to the various courts of the state the power to control their own procedure. If, therefore, the legislature should repeal the entire code of procedure as it now exists, the result would be that the procedure in each of the courts provided for by the constitution would be determinable by that court. But the Supreme Court has frequently assumed the right to review the rules which are adopted by the trial courts for their own guidance. In *Risher v. Thomas*,³⁵ the judgment of a trial court was reversed by the Supreme Court because the trial court had exacted compliance with one of its rules which had not been given due publicity. In *Pels v. Bollinger*,³⁶ the Supreme Court held that a rule of a trial court adopted in pursuance of a statute was unreasonable and arbitrary and constituted therefore an abuse of the trial court's "inherent power" to control its own procedure. If the legislature should repeal the existing code of procedure and leave the regulation of procedure in the hands of the various courts, the Supreme Court would continue to exercise a jurisdiction to prevent the trial courts from abusing their power and discretion. Is it much of a step beyond this for the legislature to say that all trial courts shall be governed by rules which are promulgated by the Supreme Court? Since the legislature may leave to each court the power to promulgate its own rules of procedure, can there be anything inherently wrong in its delegating the power to control those rules of procedure to some judicial tribunal, particularly to that tribunal which is the head of the state's judiciary and which is invested by the constitution with "general superintending control"³⁷ over all other courts? If the trial courts must submit to control of their procedure by the General Assembly, it would seem that they must also submit to control by the Supreme Court with the sanction of the General Assembly.

The constitution does not precisely mention rules of court except in providing that the judges of the circuit court of St. Louis may sit in general term for the purpose of making rules of

35. (1838) 2 Mo. 98. Cf., *Kuh v. Garvin* (1894) 125 Mo. 546.

36. (1903) 180 Mo. 252, 261.

37. This phrase "general superintending control" has generally been read to refer to control to be exercised by writs of certiorari, prohibition, etc. But is there good reason for so restricting it?

court.³⁸ This must be interpreted to mean that the rules which each of the judges of the circuit court in special term might promulgate for the guidance of his own court, shall be made uniform by a convention of the judges of the circuit court of St. Louis assembled for that purpose. The Supreme Court has decided in *State ex rel. St. Louis, etc. Ry. Co. v. Withrow*,³⁹ that by virtue of this constitutional provision the judges of the St. Louis circuit court in general term have not authority to make a rule which is opposed to a statute. In other words the constitutional power of the judges of the circuit court of St. Louis, sitting in general term to make rules of court, is precisely the same power which all other courts have and the object of the constitutional provision was to provide for uniformity among the various divisions of the St. Louis court. It is conceived, therefore, that this clause in the constitution would not be violated if the Supreme Court were given the same power which the legislature has been exercising to prescribe rules of procedure for the trial courts in St. Louis. In so far as the rules promulgated by the Supreme Court would need to be supplemented by further rules of the trial courts, the convention of the judges of the circuit court of St. Louis would still exercise its constitutional power.

The constitution forbids the General Assembly's passing any local or special law "regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before courts, justices of the peace, sheriffs, commissioners, arbitrators or other tribunals, or providing or changing methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate."⁴⁰ Under this section an act of the legislature prescribing procedure for particular trial courts might be invalid. If the legislature should leave the regulation of procedure to the Supreme Court, would that body be competent to prescribe special procedure for certain trial courts? For instance, could the Supreme Court provide by rule that a motion for a new trial must be filed with-

38. Constitution of 1875, art. VI, § 27.

39. (1896) 133 Mo. 500.

40. Constitution of 1875, art. IV, § 17.

in four days after verdict in the St. Louis circuit court, and within six days after verdict in the Taney County circuit court? Some such local differences in practice may be desirable, and it is submitted that it would be competent for the Supreme Court to make them, just as it is competent for the Public Service Commission to act specially and locally. But if the same restriction would exist on the Supreme Court as on the General Assembly, still the desired result might be achieved by general classifications. Furthermore, general rules may be so framed as to admit of supplementing by the trial courts and in such supplementing variation would be entirely proper.

It seems proper to conclude that the power of regulating court procedure is not one of those essentially legislative powers which must be exercised solely by the General Assembly. It falls rather into that class of powers partly legislative and partly judicial, as to which in Chief Justice MARSHALL'S phrase "the line has not been exactly drawn." If the legislature chooses to exercise it, there is no unconstitutional interference with the judicial department of the government; if the legislature fails to act, the courts must of necessity control their procedure, each court for itself as in England prior to the modern judicature acts. Since the power is not strictly legislative, and since if its exercise were left to the various courts the Supreme Court would still exercise a superintending control and would determine the propriety of any rules adopted by the trial courts, it would seem to be competent for the General Assembly to delegate to the Supreme Court the power of regulating procedure in all the courts of the state.

RULES OF COURT IN OTHER JURISDICTIONS

(1) *In England and the British Empire.*⁴¹

Dissatisfaction with the common law system of procedure in

41. The history and operation of court rule procedure in England has been very thoroly treated by Samuel Rosenbaum, Esq., in his valuable *Studies in English Civil Procedure*, published in 63 University of Pennsylvania Law Review 105, 151, 273, 380, 505; 31 Law Quarterly Review 304; the Journal of the Society of Comparative Legislation for July 1915; and the Law Magazine and Review for February 1915. See, also, Professor Kales' address on *The English Judicature Acts* in 1913

England led to the enactment of the civil procedure act of 1833,⁴² which authorized eight of the common law judges to make rules for the reform of pleading and under the authority of which the Hilary Rules of 1834 were issued. These rules were a compromise "between the conservatism of six centuries and the demands of modern criticism and modern convenience."⁴³ But their result was found to be beneficial and a statute of 1850⁴⁴ enlarged the rule-making power. When the English county courts were organized in 1846,⁴⁵ the power to make rules for their procedure was vested in five judges of the superior courts at Westminster, but in 1849 it was conferred upon a committee of five county court judges whose rules were subject to the approval of three judges of the superior courts. The common law procedure acts of 1852 and 1854, and the chancery amendment act of 1858, all left the control of procedure to rules of court. When the more comprehensive judicature acts of 1873 and 1875 were enacted, the principle of leaving the regulation of procedure to the courts themselves was one of their principal features and this has been true of all the subsequent judicature acts.⁴⁶ The act of 1875 left the authority to promulgate rules of procedure in a general council of the judges. In 1876 a definite rule committee was authorized, and in 1881 the number of members was increased to eight, including the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Probate, Divorce and Admiralty Division and four judges of the high court named by the Lord Chancellor. In 1894 the rule committee was enlarged by the addition of active practitioners and it now consists of the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Probate, Divorce and Admiralty Division, four other judges of the Supreme Court, two barristers and two solicitors. In 1884 this rule committee was given authority to make

Report of the Illinois State Bar Association, p. 325; and Jenks' Short History of English Law, p. 188.

42. 3 & 4 William IV, c. 42.

43. Hepburn, History of Code Pleading, p. 77.

44. 13 & 14 Victoria, c. 35, §§ 30, 32.

45. 9 & 10 Victoria, c. 95. See 1 Law Quarterly Review 305.

46. Judicature Acts were enacted in 1877, 1879, 1881, 1884, 1890, 1891, 1899, 1902, 1909, 1910.

rules for the county courts. It now possesses the exclusive power to make rules of procedure for the Supreme Court, with a few exceptions.⁴⁷ "In its discretion lies the making or amending of all rules affecting the sittings of court, the duties of its officers, pleading, practice and procedure and costs of proceedings."⁴⁸ The judicature act of 1875 provides in very broad terms that "rules of court may be made for regulating the pleading, practice and procedure of the Supreme Court and in general for regulating any matters relating to the practice and procedure therein." The rules promulgated by the rule committee may be vetoed by Parliament and they are put before both houses of Parliament within forty days after they are made. No rules are promulgated until notice has been given and opportunity is afforded for discussion of proposed changes by members of the bar.

Contrary to the view which is sometimes expressed in this country the English judicature acts are in no sense practice codes. They do not lay down general principles of practice and procedure which are to be supplemented by rules of court, but they leave the field of procedure entirely to court rules and the power of the rule committee is so broad that it may abrogate any act of Parliament prior to 1875 having to do with procedure. The act of 1875 did, however, carry with it a set of rules recommended for adoption, but these were entirely subject to alteration and amendment and few of them still obtain.⁴⁹

The English example of regulating procedure by rules of court alterable by the local judges with the approval of the local executive has been followed thruout the British Empire with a few exceptions.⁵⁰ In Ireland, the Judicature Act of 1877 followed the English Acts of 1873 and 1875. The Irish Rule Committee

47. The most important of the exceptions is that the President of the Probate, Divorce and Admiralty Division regulates the procedure as to divorce. See Rosenbaum, *Studies in English Civil Procedure*, 63 Pennsylvania Law Review 166, note.

48. 63 Pennsylvania Law Review 165.

49. A new set of rules was adopted in 1883, one hundred of which were amended by 1890. In 1893 some new rules were adopted and numerous amendments and additions have since been made.

50. See Rosenbaum, *Rule-Making in the Courts of the Empire*, 15 Journal Comparative Legislation (n. s.) 128, upon which the statements in the text are largely based.

has three practitioners in its membership and it possesses very plenary powers. The Irish Rules were revised in 1905. The courts of Scotland have exercised the power to control their procedure since the sixteenth century. In Ontario procedure has been controlled by rules of court since 1881,⁵¹ tho the rule committee was not established until 1913. In Manitoba, Nova Scotia, and New Brunswick, the courts may make rules governing their procedure but the legislatures have not entirely kept out of the field. In South Africa the courts' control of procedure dates from 1834. In Australia the courts control their own procedure by rules, except in New South Wales and Tasmania; and the 1908 Code of India conferred the power on the High Courts there.

(2) *In the Federal Courts.*

The Judiciary Act of 1789 providing for the organization of the federal courts conferred on them the power "to make and establish all necessary rules for the orderly conduct of business in said courts, provided such rules are not repugnant to the laws of the United States."⁵² In the Process Act of 1792, it was provided that the procedure in the federal courts should be "subject to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the Supreme Court of the United States shall think proper from time to time to prescribe to any circuit or district court."⁵³ It was under the authority of this act that in 1822 the Supreme Court promulgated the first rules of practice for the equity courts.⁵⁴ In 1842 a new set of equity rules was substituted.⁵⁵ Numerous amendments were made to these rules from time to time and three new rules were added, one as to

51. See Herbert Harley, *Ontario Courts and Procedure*, 12 Michigan Law Review 339, 447.

52. 1 U. S. Statutes at Large, p. 83.

53. 1 U. S. Statutes at Large, p. 276. The present statute is of similar effect as to suits in equity and admiralty. U. S. Revised Statutes, § 913.

54. These rules were first published in 7 Wheaton.

55. First published in 1 Howard. The Supreme Court's authority was confirmed by the Act of 1842, c. 188.

foreclosure of mortgages in 1864, one as to injunctions in 1879 and one as to stockholders' bills in 1882.⁵⁶ Of course dissatisfaction with the equity rules grew up as they became obsolete, but there was no organized effort of the bar to secure their revision. In 1911, the Supreme Court on its own initiative, tho with the President's encouragement, appointed a committee of its members to consider the revision of the equity rules and this committee requested each of the Circuit Courts of Appeal to appoint a committee of three members of its bar to cooperate by submitting suggestions for changes in the rules. In 1913, a wholly new set of rules based on these suggestions was promulgated and the new rules have on the whole proved satisfactory.

In 1842, Congress conferred on the Supreme Court general power to regulate practice in admiralty and the rules were promulgated in the same year and amended in 1896.⁵⁷ Since the Bankruptcy Law of 1898, the procedure in bankruptcy cases has been controlled by rules promulgated by the Supreme Court in 1898 and amended in 1905.⁵⁸ In 1909, the Supreme Court was invested with power to control procedure in copyright cases.⁵⁹

The exercise of these powers by the Supreme Court has met with such general approval among members of the bar that it is now sought to confer on the Supreme Court the power to control the procedure at law in the various federal courts by rules. The Act of 1872⁶⁰ which is still in force requires the procedure at law in the federal courts to conform to the procedure "existing at the time in like causes in the courts of record of the State." The American Bar Association has recommended that the procedure in all federal courts be made uniform,⁶¹ and the pending bill would confer on the Supreme Court the power "to prescribe, from time to time and in any manner, the forms and manner of service of writs and all other process; the mode and

56. Amendments were made in 1850, 1854, 1861, 1869 and 1871.

57. See 160 U. S. 693.

58. See 172 U. S. 653.

59. See 214 U. S. 533.

60. Now U. S. Revised Statutes, § 914. For the previous history of legislation as to federal procedure at law, See 1 Rose, Code of Federal Procedure, § 883.

61. 1910 Report of the American Bar Association, p. 614.

manner of framing and filing proceedings and pleadings; of giving notice and serving process of all kinds; of taking and obtaining evidence; drawing up, entering and enrolling orders; and generally to regulate and prescribe by rule the forms for the entire pleading, practice, and procedure to be used in all actions, motions, and proceedings at law" in all the district courts.⁶² The bill has been approved by forty-two state bar associations.

The federal Commerce Court exercised complete control over its own procedure and the court of claims still does so.⁶³ The Interstate Commerce Commission has long had control of its own procedure,⁶⁴ and similar power was conferred on the Federal Trade Commission, established in 1914.

(3) *In Other States.*

The common law procedure which prevailed thruout the American states prior to the modern codes was really nothing more than court-made procedure. Some of these rules of court still prevail either as code provisions or as parts of unwritten codes. A New York rule of 1799 as to "enumerated motions" still has a place in the New York Code.⁶⁵

In several states the highest court is given power to regulate procedure in other courts, but subject to the continued and superior control of the legislature. Since 1849, the so-called Code of Virginia has authorized the Supreme Court of that state to make general regulations for the practice of all the courts.⁶⁶ The Delaware Code of 1852 contained a similar provision.⁶⁷ In 1850 the Michigan constitution provided that the Supreme Court should by general rules establish, modify and amend the practice for the various courts of the state,⁶⁸ but the

62. See 1915 Report of the American Bar Association, p. 502, 508; Report of Committee on Judiciary in the 63d Congress, H. R. 462. For a definition of the term "procedure" as it is used in such statutes, see *Kring v. Missouri* (1883) 107 U. S. 221, 231.

63. See 3 Foster, Federal Practice (5th ed.) 2964.

64. See Fuller, Interstate Commerce, p. 429.

65. Demarest, American Jurisprudence, p. 91.

66. Virginia Code of 1904, § 3112.

67. Delaware Revised Code of 1852, c. 106.

68. Michigan Constitution of 1850, art. VI, § 5. A similar provision may be found in the Michigan Constitution of 1909, art. VII, § 5.

Michigan Supreme Court has very sparingly exercised this power and has submitted to legislative direction.⁶⁹ In 1892, the Texas legislature gave to the Supreme Court power to promulgate rules of procedure for all of the courts of the state, but it did not give authority to replace the statutory rules of procedure.⁷⁰ A similar provision has obtained in New Mexico since 1897.⁷¹ The New Hampshire Supreme Court has revised procedure in the trial courts without any statutory authority.⁷²

In most of the states the trial courts have authority to supplement the statutory rules with rules of their own. This authority is frequently confirmed by statute. In Massachusetts the trial courts have very broad powers, and it is expressly provided that their rules shall not conflict with those of the Supreme Judicial Court.⁷³ In Connecticut, the judges meet in convention for this purpose.⁷⁴ In the recently established municipal courts in Chicago and Cleveland, the procedure is largely in the hands of the courts themselves. The same policy is now quite generally followed in the creation of administrative tribunals such as public service commissions⁷⁵ and industrial commissions.

But much more significant is the recent general movement toward the abandonment of statutory codes of procedure and the concentration of control over procedure in one court to

69. See Willis B. Perkins, *Remedies in Court Procedure*, 12 Michigan Law Review 362, 367.

70. Sayles' Texas Statutes 1914, § 1524.

71. New Mexico Statutes 1915, § 4258.

72. See *Owen v. Weston* (1885) 63 N. H. 599, 604. In 1859 the Supreme Court of New Hampshire adopted rules regulating the practice in chancery. 38 N. H. 604. This seems to have been authorized by statute in 1842. See 10 Illinois Law Review 364.

73. Massachusetts Revised Laws 1902, c. 158, § 3.

74. Connecticut General Statutes 1902, § 467.

75. The Missouri Act of 1913, creating the public service commission, provided that "the hearings before the commission shall be governed by rules to be adopted and prescribed by the commission." Laws of 1912, p. 569.

It is interesting to note that the Commissioners on Uniform Laws in drafting the Uniform Land Registration Act have provided that procedure in the proposed courts of land registration shall be governed by rules promulgated by the highest state court. In this form the Act was approved by the Commissioners at their 1916 meeting; and the Virginia land registration act of 1916 embodies this provision. See Virginia Acts of 1916, p. 70.

which is given power to promulgate rules for all the courts. The lead was taken in the New Jersey Practice Act of 1912 which is to some degree fashioned on the English judicature acts of 1873 and 1875. The New Jersey legislature did not completely relinquish control but enacted a statute of thirty-four sections which cover the more general principles of procedure and supplemented them with legislative rules which were to be "considered as general rules for the government of the court and the conducting of causes," but which were made subject to being "relaxed or dispensed with by the court in any case where it shall be manifest to the court that a strict adherence to them will work surprise or injustice." Any of these rules may be changed by the Supreme Court at any time and the same court is given power to replace prior statutory or traditional regulations of procedure with its rules.⁷⁶

In 1913, the Colorado legislature enacted a short court-rules act, providing simply that "the Supreme Court shall prescribe rules of practice and procedure in all courts of record and may change or rescind the same. Such rules shall supersede any statute in conflict therewith. Inferior courts of record may adopt rules not in conflict with such rules or with statute." This statute gives the Supreme Court complete control without attempting to lay down any general principles. The rules promulgated under it have encountered strong opposition, but the Court has shown a disposition to make the changes demanded.⁷⁷ A strong but unsuccessful effort was made to repeal the Colorado Act in 1915. The Colorado Bar Association has recently requested the Supreme Court to "appoint a Standing Rules Committee consisting of several judges of that court, several judges chosen by them from the district and county judges of the state, and several practicing lawyers whose duty it shall be to consider and recom-

76. On the New Jersey Act, see 3 Virginia Law Review 18; 75 Central Law Journal 144. The Act was entirely the work of a committee of the New Jersey Bar Association and its passage was due to its efforts. See the report of the association for 1912-13, p. 61.

77. See the 1915 report of American Bar Association, p. 853, for an account of the Colorado practice by Chief Justice Gabbert; and the 1916 Report of the Colorado Bar Association for a criticism of the rules by E. L. Regennitter, Esq. Rule 2 met strong opposition from the bar and was repealed by the court.

mend to the Supreme Court such rules and amendments as they may deem proper.”⁷⁸

In 1913, also, the New York legislature approved the plan of judicial control of procedure by directing the board of statutory consolidation to prepare a practice act to be “supplemented by rules of court to be adopted by the courts which shall regulate the important details of practice, minute statutory details of practice being omitted.”⁷⁹ The act now proposed in New York follows the New Jersey Act in laying down general principles and leaving details to rules of court; the act consists of seventy-one sections, while the proposed rules number four hundred and one.⁸⁰

In 1915, the legislature of Alabama gave the Supreme Court “full plenary power to adopt such rules and to regulate the practice and proceedings as they may deem proper, and to furnish forms of indictments, complaints, bills, pleas and process, and to mould the procedure in all the courts and prescribe rules of evidence in the same, from time to time, as experience may determine that the existing rules do not fully meet the ends of justice.”⁸¹ The Alabama Court has not yet promulgated any new rules under this authority. Obviously the statute gives broader power than is possessed by any other state court.

In 1915, also, the Michigan legislature made it the duty of the Supreme Court “by general rules to establish, and from time to time thereafter to modify and amend the practice in such court and in all other courts of record” and to periodically revise such rules with a view to attaining the following improvements in the practice:

“2. The abolishing of all fictions and unnecessary process and proceedings.”

“3. The simplifying and abbreviating of the pleadings and proceedings.”

78. Thru a committee of which E. L. Regennitter, Esq., of Idaho Springs, Colo., is chairman. This committee's report was approved at the 1916 meeting of the Colorado Bar Association.

79. N. Y. Laws of 1915, c. 713.

80. See volume one of the 1915 report of the board of statutory consolidation where the various proposals of the board are very fully and very ably discussed.

81. Alabama Laws of 1915, p. 607.

"6. The remedying of such abuses and imperfections as may be found to exist in the practice."

"7. The abolishing of all unnecessary forms and technicalities in pleading and practice."⁸²

The Supreme Court of Michigan has acted in response to this statute and has approved and promulgated a complete revision of circuit court rules, prepared by a committee of the Michigan State Bar Association.

More recently, in 1916, the legislature of Virginia has amended its early statute referred to above and directed that "the supreme court of appeals shall, from time to time, prescribe the forms of writ and make general regulations for the practice of all the courts of record, civil and criminal; and shall prepare a system of rules of practice and a system of pleading and the forms of process to be used in all the courts of record of this state, and put the same into effect."⁸³

In numerous other states, bar associations have approved the principle of judicial control of court procedure. Indeed, the principle seems to be accepted wherever reform is being agitated.⁸⁴ The reforms actually accomplished in New Jersey, Colorado, Alabama, Michigan and Virginia seem to presage a general movement in this direction thruout the country, just as the Field Code led the general movement toward statutory control of procedure a half-century ago.

THE DETAILS OF THE PROPOSAL

If it be decided that it is desirable to re-commit to the courts the control over rules of procedure which they formerly exercised, it will be necessary to work out the details of the proposal.

82. Michigan Judicature Act of 1915, c. 1, § 14. The language of an earlier statute of 1851 was not dissimilar. See Michigan Laws of 1851, p. 106. See Professor Sunderland's articles on the recent Judicature Act, 14 Michigan Law Review, 273, 383, 441, 551.

83. Virginia Acts of 1916, p. 939. The earlier statute was only permissive, and clearly contemplated the necessity of legislative assent to new rules.

84. At the recent 1916 meeting of the California Bar Association a committee presented a somewhat elaborate report recommending that the procedure be regulated by rules of court and the recommendation was approved by the association by a practically unanimous vote. The

On whom shall the rule-making power be conferred? On the Supreme Court? On a judicial convention to be composed of both trial and appellate judges and perhaps some practitioners? Or on the trial judges themselves, acting in such unison as to insure uniformity thruout the state? In favor of conferring the power on the Supreme Court alone, it may be said that it is almost constantly in session and no special convening would be necessary which might cause delay; no new appropriations would have to be made for the expense of the work; the Supreme Court must in any case be the ultimate judge of the propriety and constitutionality of the rules adopted and it would seem simpler to permit it to formulate them. It may be argued that appellate judges are frequently not in touch with the conditions prevailing at the trial; but it is not likely that the court would ever proceed to make important changes without consulting the bar and it may be expected that it will depend almost wholly upon the guidance of practitioners and judges. It would seem the proper course for the Supreme Court to refer all suggestions of changes to a committee of the bar association and to have a report from such a committee before taking action. Just as persons are now admitted to the bar by the Supreme Court upon the recommendation of a board of bar examiners, so ought the Supreme Court to exercise the power of promulgating rules of procedure upon the recommendation of a committee of the bar association. If the proposal is adopted and if the bar wishes it, there is every reason to believe that the court would follow this practice.

It would then seem desirable that the power should be with the Supreme Court rather than with any convention of judges or of judges and practitioners. In New Jersey, Colorado, Alabama and Michigan the Supreme Court alone has the power, and in each of these states the bar has had a large if not controlling influence in framing the rules. In England, Ireland, and Canada, the power is exercised by a committee of the Supreme Court and of chosen practitioners. In framing the

Recorder (San Francisco) for August 19, 1916. The Ohio Bar Association, at its 1916 meeting, gave extended consideration to the proposal and approved it. 61 Ohio Law Bulletin 241.

new equity rules in 1913, the Supreme Court of the United States appointed a committee of its own members and this committee sought the cooperation of practitioners from each of the circuits.

Another question arises as to the extent of the power to be conferred upon the Supreme Court. Shall the legislature put the entire subject of court procedure in the hands of the Supreme Court, or shall it enact a short practice code laying down general principles and prescribing the general outlines of practice to be followed, but leaving the details to be fixed by rules of court? In 1912 the committee of the Missouri Bar Association recommended the latter course. In 1913 the committee recommended the repeal of all statutes relating to pleadings, the amendments of pleadings, issues, continuances, trials, new trials, arrest of judgment and bills of exceptions, and the substitution therefor of court-made rules. This recommendation would leave a shorter practice code than we now have, but it would continue to deal with various matters of detail. Both committees based their suggestions on the New Jersey Act. It would seem more desirable to follow the Colorado, Alabama, Virginia and English practice in conferring on the Supreme Court the larger power to deal with procedure without restriction; but for a beginning and until the general acceptance of the principle of judicial control has been vindicated by success, it may be expedient to retain a statutory frame-work. The few principles which ought to be beyond court control may easily be summarized, and they are for the most part contained in the constitution itself.

As the proposal is usually framed, it does not include the suggestion that the regulation of all appellate procedure be left to rules promulgated by the Supreme Court. For the most part, each of the four appellate courts in Missouri now controls its own procedure by rules of court and tho uniformity in some details is lacking, no serious inconvenience results. The Supreme Court will, if necessity arises, pass on the propriety of a rule of a court of appeals, for this seems to be a part of its "general

superintending power," and little advantage would be gained from the uniformity which might ensue from its larger control. But since many cases are carried from the courts of appeal to the Supreme Court, it seems desirable that the latter's rules of appellate procedure should prevail in all the appellate courts.⁸⁵ The Code Commission of 1914 recommended an amendment of the present statute looking toward this result.⁸⁶

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85. In *Wolf v. Harris* (1916) 184 S. W. 1139, an appeal was perfected to the Kansas City Court of Appeals which transferred the case to the Supreme Court. The rules of the latter court concerning the perfecting of appeals had not been complied with, but the court said it would not scrutinize too closely "lest an appellant caught unwittingly between their rules and ours should be pinched out of any appeal at all."

86. See the report of the Missouri Code Commission of 1914, p. 60, proposing a substitute for Revised Statutes 1909, § 2049.

Certiorari From the Missouri Supreme Court to the Courts of Appeals

In a previous number of the Law Series the writer published an article on the subject "The Writ of Certiorari in Missouri," which treated generally of the use of that writ in this state.¹ This article was published largely because the Supreme Court of Missouri in several cases then recently decided had overruled a long list of earlier decisions and had held that under the constitution it had authority by writ of certiorari to quash the judgment of a court of appeals that had not followed "the last previous ruling of the Supreme Court on any question of law or equity."² No attempt was made to discuss fully the extent of the constitutional authority of the Supreme Court where it is claimed that its last previous ruling has not been followed by a court of appeals or what may be considered by the Supreme Court upon issuance of a preliminary writ of certiorari. The decisions at that time seemed to contain too little material for a discussion of these topics; but the decisions during the last two years have involved more extended consideration of them, and it is thought that a discussion of all the cases would now be of interest to the profession in Missouri. As the questions involved are new and as there may be difference of opinion even as to just what has been decided a somewhat detailed statement of the cases will be necessary.

Probably it is desirable first to look at the case that overruled the earlier decisions and established the rule that seems now to be firmly settled to the effect that the Supreme Court

1. 6 Law Series, Missouri Bulletin, p. 3.

2. Constitution of 1875, Amendment of 1884., § 6.

possesses constitutional power to issue these writs to the courts of appeals of Missouri to bring about harmony of judicial decisions in this state. The title of that case is *State ex rel. Curtis v. Broaddus*,³ in which the judgment of the Kansas City Court of Appeals was quashed. A suit was brought by Curtis against Sexton for breach of a contract to purchase land; upon the first trial the circuit court held that the plaintiff had not made a case and directed a verdict for the defendant; the plaintiff thereupon appealed to the Supreme Court which held that the ruling of the trial court was erroneous and reversed the judgment.⁴ Upon a retrial the plaintiff received a verdict and the defendant appealed to the Supreme Court which transferred the case to the Kansas City Court of Appeals, where the judgment of the circuit court was reversed because it was thought the plaintiff had not adduced proof tending to prove his cause of action.⁵ The plaintiff thereupon filed motions in the court of appeals for a rehearing and to transfer the case to the Supreme Court. These motions were overruled and thereupon he filed in the Supreme Court an application for a writ of certiorari claiming that the decision of the court of appeals was in conflict with the former decision of the Supreme Court in the same case, wherein it had been held that his proof did tend to establish a cause of action and did entitle him to have the case submitted to a jury. A preliminary writ was issued. The case was argued in the Supreme Court *in banc* and an opinion was written by FERRISS, J., which failed of adoption by the majority of the court. The case was reassigned to BROWN, J., who wrote an opinion which received the approval of a majority of the court. At the outset of the opinion Judge BROWN considered the argument that was made for the respondents that the decision of the Kansas City Court of Appeals was not in conflict with the decision of the Supreme Court "because the evidence in the second trial was wholly different from the evidence before the court upon the first appeal." He stated that a com-

3. (1911) 238 Mo. 189.

4. *Curtis v. Sexton* (1907) 201 Mo. 217.

5. *Curtis v. Sexton* (1910) 142 Mo. App. 179.

parison of the opinion in the former decision of the Supreme Court and of the opinion of the court of appeals tends to show "that the decision of the court of appeals is not in conflict with our decision." He did not end the matter at this point, but stated that an examination of the evidence in the case as first decided by the Supreme Court, when it was held plaintiff was entitled to go to the jury, showed that it was the same evidence as was held by the court of appeals to be not sufficient to entitle the plaintiff to go to the jury. As to this he says: "We have carefully examined the record upon which the decision of the Kansas City Court of Appeals is based, and compared it with the record which was before us on the former appeal, and find that the evidence on the part of the plaintiff in both trials was substantially the same, so far as such evidence tends to make out a case against the defendant Sexton." He then stated that under the constitution the Supreme Court had the power to quash a decision and judgment of a court of appeals that had not followed the previous ruling of the Supreme Court and held that it had such power where the ruling of the Supreme Court, not followed, has been made in the same case. VALLIANT, C. J., GRAVES and KENNISH, JJ., concurred.

In a separate opinion in which LAMM, J., concurred, FERRISS, J., expressed the opinion that the Supreme Court had authority under the constitution upon writ of certiorari to quash the judgment of the court of appeals because the matter in controversy was *res adjudicata*, in as much as there was no way by writ of error or appeal to get the case again into the Supreme Court. He expressly limited the right to issue the writ to cases where a court of appeals has failed to follow the ruling of the Supreme Court in the *same* case; and as to such action of the court of appeals he says: "If that court attempts to disregard the decision of this court, upon such point it exceeds its jurisdiction. When a court acts without jurisdiction, or in excess of its jurisdiction, it is in error, and the error may be reached by certiorari." Tho it seems that the learned judge took too narrow a view of the constitutional power of the Supreme Court, and that the majority view that the power exists

to quash a judgment of a court of appeals in any case where the previous ruling of the Supreme Court has not been followed is the better view, yet an attempt will later be made to show that his statement, that a court of appeals that fails to follow the ruling of the Supreme Court in the same case exceeds its jurisdiction, is sound, and that the same statement is equally sound when applied to a decision and judgment of a court of appeals which fails to follow the controlling decisions of the Supreme Court tho the ruling be made in another case. Judge FERRISS concluded his opinion by stating that the decision of the court of appeals was not in conflict with the decision of the Supreme Court, taking the facts as stated in the opinion of the Supreme Court; but that the facts were erroneously stated in the opinion of the Supreme Court and that the court of appeals was not bound, as had been held by a majority of the court, to compare the abstracts presented upon each appeal to determine actually whether the evidence was the same, "because even if that court had examined the record, and had seen that the facts in the two records were alike it still could properly have said that the judgment of the Supreme Court must be applied to the facts as stated in the opinion, and not to the facts as stated in the record." He concluded therefore the preliminary writ should be quashed.

WOODSON, J., in a dissenting opinion expressed the view that the constitution did not empower the Supreme Court to issue the writ of certiorari to review a decision and judgment of a court of appeals; that under the constitution the judges of the courts of appeals have sole authority to determine whether their decisions are in conflict with the controlling decisions of the Supreme Court; that the Supreme Court has no power to review a court of appeals decision by certiorari or any other writ in any case where the court of appeals has appellate jurisdiction tho its decision be "in conflict with the opinions of this court." He was of the opinion consequently that the preliminary writ should be quashed.

In the first case decided, therefore, the majority of the judges of the Supreme Court were of the opinion that the ab-

stract of the record as filed in the court of appeals might be examined upon certiorari, where an examination thereof was necessary to determine whether the controlling decision of the Supreme Court had in fact been followed by the court of appeals. Since this decision the question as to what will be brought up and examined upon certiorari has frequently been raised in and discussed by the Supreme Court, but as will be seen from an examination of the later cases the law on this phase of certiorari from the Supreme Court to a court of appeals is not yet free from doubt.

The next case was *State ex rel. Evans v. Broaddus*,⁶ where again the decision and judgment of a court of appeals was quashed. The opinion of the Supreme Court was written by LAMM, J., and the entire court concurred. The Kansas City Court of Appeals had held that it had authority to issue a writ of mandamus to a sheriff to compel him to execute a commitment warrant to put in jail a witness who had been committed by a notary public for contempt for refusing to answer questions when his deposition was being taken. Previously the witness had filed in the circuit court a petition for a writ of *habeas corpus* and that petition was then pending. The Supreme Court held that the court of appeals had no such power because of the pendency of *habeas corpus* proceedings and that in issuing the writ of mandamus it had not followed the controlling decisions of the Supreme Court. Judge LAMM pointed out that certiorari is issued by a higher to a lower court "in order that profert of the challenged record be made to be searched for jurisdictional defects—that is, orders, judgments and parts of judgments without (or in excess of) the jurisdiction of the subordinate court making or rendering them." He also pointed out that it does not issue to compel the lower tribunal to make a record and that it is not to be employed to bring about a review of the rulings of the lower court upon the merits of the case. This latter statement doubtless was made in answer to an argument that the evidence in the mandamus proceeding in the court of appeals could not be examined. As to that he says: "But that contention avails naught here; for the

6. (1912) 245 Mo. 123.

facts as set forth appear on the face of the record itself. Hence, we disallow the point to respondents."

It would seem then that this decision does not hold that the abstract of the record as filed in a court of appeals, including the evidence therein, will never be examined to determine whether a court of appeals has in fact followed the controlling decisions of the Supreme Court. While it is true that upon certiorari the merits of a case will not be reviewed and that evidence adduced in the lower tribunal will not be reconsidered to determine what should have been found to be the facts in the controversy, yet it by no means follows that the evidence upon which the lower tribunal acted and which appears in the record will not be looked at in determining whether such action was in excess of the jurisdiction of the court, and whether upon the facts as found by the verdict of the jury or the court, the court of appeals has followed the last previous ruling of the Supreme Court in deciding the case. Of this matter more will be said later on.

In *State ex rel. Iba v. Ellison*,⁷ also referred to in the previous article, the decision and judgment of the Kansas City Court of Appeals was quashed under these circumstances. The opinion of the Supreme Court was written by FARIS, J., and received the approval of LAMM, C. J., GRAVES, BROWN and WALKER, JJ. WOODSON, J., dissented in a separate opinion in which BOND, J., concurred. The Kansas City Court of Appeals, according to the holding of a majority of the Supreme Court, did not follow controlling decisions of the Supreme Court in deciding whether a circuit judge had acted upon a correct view of the law as to the duty of a trial judge to set aside a verdict of a jury on the ground that it is against the weight of the evidence.⁸ What the trial judge said in passing upon the motion for a new trial was stated in the opinion of

7. (1914) 256 Mo. 645.

8. *Iba v. C. B. & Q. Ry. Co.* (1913) 172 Mo. App. 141.

Pursuant to the mandate of the Supreme Court the court of appeals after a reargument rendered a decision affirming the judgment below for \$5000. (1915) 186 Mo. App. 718. Again, the case came before the Kansas City Court of Appeals, (1916) 182 S. W. 135, on appeal

the court of appeals thus the facts to which the rule of law was to be applied were found by the Supreme Court without further investigation of the record. The Supreme Court held that the court of appeals had reached a conclusion on these undisputed facts that was not warranted, that the court of appeals was in error in holding that it was the duty of the trial judge to consider certain affidavits that had been filed some forty-five days later than the rule governing the time of filing the motion for a new trial required, and his duty not to consider the result of a criminal prosecution for perjury against one of the witnesses which occurred some fifty-seven days after the expiration of the time lawfully to file a motion for a new trial on the ground of perjury and newly discovered evidence. Judge FARIS, however, considered what might have been held had the court of appeals not discussed what was said by the trial judge, and stated that if the opinion of the court of appeals had disclosed that it had made a mistake as to the facts and "had shown, in other words, that the court found that Judge Rusk was of the view even before the affidavits charging perjury were filed and before the verdict of acquittal came in, that the preponderance of the evidence was so greatly in favor of the defendants as to warrant him in setting the verdict aside," a different question would have been presented. Judge Rusk had said when the verdict of the jury was returned that he felt that he would have decided the case the other way had it been submitted to him, but that he did not feel that the weight

from an order of the circuit court overruling defendant's motion to quash the execution. The contention was made that neither the trial court nor the court of appeals had jurisdiction as the writ of certiorari was issued by the Supreme Court to the court of appeals after the term had expired (March Term, 1913), at which the court of appeals reversed the judgment of the trial court, and that the latter judgment was a finality notwithstanding the mandate of the Supreme Court upon certiorari. The court of appeals affirmed the action of the trial court holding that (a) its first judgment was in excess of its jurisdiction and therefore void and not a final judgment; and (b) that at all events the Supreme Court had quashed that judgment and it was incumbent upon the circuit court and the court of appeals, inferior courts, to obey the mandate of the Supreme Court whatever either might think as to the writ of certiorari being issued improperly because issued after the expiration of the term of the court of appeals at which the cause was decided.

of the evidence was so greatly with the defendant as to warrant him in setting the verdict aside; that later when he considered the affidavits which were filed forty-five days too late, which tended to show perjury upon the part of the principal witness, he changed his views and concluded that it was his duty to set the verdict aside; and that still later when he learned the witness in question had been tried and acquitted of a criminal charge of giving perjured testimony he concluded that he should "respect the verdict of that jury" and that his own views as to the perjury should not prevail and that he would not act upon his own views and would not set the verdict aside out of regard for the result of the trial in the criminal court. Judge FARIS concluded that it was not the duty of the trial judge, according to decisions of the Supreme Court to consider these affidavits and the acquittal in the criminal case, and that the court of appeals was in error in holding that Judge Rusk took an improper view as to the effect of the finding in the criminal case; that in truth Judge Rusk had no legal right to consider either the affidavits or the acquittal of the witness, and that his views which were changed by the affidavits and by the acquittal were legally of no importance. In the course of his opinion Judge FARIS made the following statements as to the scope of the inquiry upon certiorari and as to the effect of a determination of the facts by a court of appeals: "We repeat, that if the learned judge who wrote the opinion in the Court of Appeals had found that Judge Rusk was at the end of the trial in the Iba case of the opinion that the verdict therein should be set aside because it was against the weight of the evidence, then no valid objection to his views could be urged, and while opinions might differ as to the correctness of such view of the facts upon this record, yet, no ground for jurisdiction in us by certiorari would have existed; because the error, or difference in view, would then have arisen upon a question of fact. On such a question, in cases wherein they have jurisdiction, the several courts of appeals have the same right to decide, even erroneously, as we have, and we may not interfere in any wise, whether in our judgment, their opinion be right or wrong. Upon a point of law arising from undis-

puted facts, they are required to follow the last previous ruling of this court. [Section 6, Amendment of 1884, Constitution of Missouri] If they do not we have held that a judgment rendered by them in contravention of the constitutional mandate above referred to may be quashed by us upon certiorari." These statements seem to be unnecessary to the decision as he had held upon the facts as stated by the court of appeals that its judgment was wrong, and the statements are therefore entitled only to the weight to be given to the *dicta* of a learned judge.

Judge WOODSON based his dissent in the case upon the reasons he expressed in *State ex rel. Curtis v. Broaddus*,⁹ and enlarged upon them by observing that there was no more than an erroneous ruling in the case and that if the court of appeals had erroneously ruled they had not exceeded their jurisdiction but had committed merely an error in deciding a case over which their appellate jurisdiction was complete and that the Supreme Court had no authority to correct an error of this nature.

In *State ex rel. United Railways Company v. Reynolds*,¹⁰ also mentioned in the previous article, the question of the scope of the inquiry upon certiorari was touched upon in the court's opinion. Here, however, the preliminary writ of certiorari issued to the St. Louis Court of Appeals was quashed. The St. Louis Court of Appeals in affirming a judgment in a personal injury suit for negligence had held that no error was committed by the trial court in giving an instruction authorizing the jury to assess damages for loss of time by an unskilled laborer, tho there was no evidence as to the wages he was receiving. Before passing upon the question whether the ruling of the court of appeals was in harmony with the law as determined by the Supreme Court, Judge BROWN who wrote the majority opinion, raised the question whether the Supreme Court should ascertain the facts from the statement prepared by or contained in the opinion of the court of appeals, or whether the court should look at the evidence in the case to

9. (1911) 238 Mo. 189.

10. (1914) 257 Mo. 19.

determine whether the statement so made by the court of appeals was correct. He concluded that the statement as made by the court of appeals should be taken as final. He distinguished *State ex rel. Curtis v. Broaddus*¹¹ where the evidence was reexamined, on the ground that it had "once been before us on the sufficiency of the evidence and a ruling made that such evidence for plaintiff made out a *prima facie* case for the jury." He then stated that in cases where the facts have not previously been before the Supreme Court, it should consider "only the pleadings, evidence and facts as recited by the Court of Appeals whose judgment is sought to be quashed," and that tho it may be argued that a court of appeals may fail to state correctly the facts and pleadings and that this might result in an individual case being decided improperly and in conflict with the law as determined by the Supreme Court, yet this result would not be contrary to the "primary object sought by Section 6, Article 6, supra, i. e., the uniformity of judicial construction on issues of law and equity in this state."

It was conceded by both parties in this case that the evidence showed that the plaintiff was a laborer engaged in hauling ice cream cabinets for a manufacturing company from the factory to a railroad station for shipment and that he was unable to work for some time as a result of his injury. Judge BROWN held that the instruction which authorized recovery for loss of time was at least supported by sufficient proof to entitle the plaintiff to recover nominal damages tho there was no proof of what he had received for his time as laborer, and that it was the duty of the defendant at the trial, if it desired to have the jury more specifically advised, to prepare an instruction upon the question of damages limiting the right of plaintiff's recovery for loss of time to nominal damages. Whether there was or was not evidence of the amount of wages received was not important, therefore, according to the actual decision of the Supreme Court. And again it seems that the statement of Judge BROWN as to whether the evidence produced at the trial should be examined upon certiorari was be-

11. (1911) 238 Mo. 189.

side the question and not actually before the court for decision. He expressly stated that "whether a jury will be presumed to know what the services of such common laborer are worth at a given time and place is a matter not necessary to a decision of this case, and upon which we express no opinion." Had Judge BROWN concluded that it was necessary to know whether there was evidence as to the amount of wages the plaintiff was earning, his statement as to the scope of the inquiry upon certiorari would have been necessary to a decision and would be regarded as a direct ruling on a question involved in the case; but inasmuch as it was unnecessary to determine what the evidence showed as to the amount of the wages his statements are only *dicta*. LAMM, C. J., concurred in the opinion, while WALKER and BOND, JJ., concurred except in that part of the opinion which held that the Supreme Court had jurisdiction. WOODSON, GRAVES and FARIS, J. J., concurred as to jurisdiction in opinions filed by GRAVES and WOODSON, JJ., respectively, and dissented from the result reached. Judge GRAVES stated in his dissenting opinion that the ruling of the court of appeals was in conflict with several decisions of the Supreme Court. He did not discuss the facts in the case. Judge FARIS concurred with Judge GRAVES. Judge WOODSON stated that he thought it unwise to dissent further, as to the jurisdiction of the Supreme Court in these cases as a majority of the judges of the court had held otherwise and said that he agreed with Judge GRAVES that the decision of the court of appeals was not in harmony with the controlling decisions of the Supreme Court. He did not discuss the facts in the case.

The cases that will be discussed from this point were not cited in the previous article as the opinions were not available at that time. In *State ex rel. Zehnder v. Robertson*,¹² the Springfield Court of Appeals had affirmed the conviction of two persons charged with violating the local option law of Phelps County. It was claimed that the convictions were improper as the information did not state that the local option law had been adopted in that county. The information stated

12. (1914) 262 Mo. 613.

that at the time of the alleged violation "the Local Option Law was in full force and effect in the aforesaid county of Phelps." The Supreme Court held that the information did sufficiently allege the adoption of the local option law, according to the rule of pleading in misdemeanor cases as determined by prior decisions of the court, and that this being true, the preliminary writ that had been issued should be quashed. Speaking thru GRAVES, J., the court held that it would not consider upon certiorari whether the prior decisions of the Supreme Court were correct. "It would hardly be expected in this kind of a case that we would quash the Court of Appeals judgment, if it was made clear that they had followed our latest ruling upon the identical question, although our ruling might be wrong. The Constitution requires these courts to follow our latest ruling, and we cannot convict them of error if they so do, whether we were right or wrong." This view of the question seems undoubtedly sound. A court of appeals in deciding a case according to the last controlling decisions of the Supreme Court does that which it is required to do under the constitution and that which it is required to do is neither error of judgment nor an improper exercise of jurisdiction. In this opinion all the court concurred except BOND, J., who concurred in the result only.

In the next case, *State ex rel. Jones v. Robertson*,¹³ the Supreme Court refused to quash the decision and judgment of the Springfield Court of Appeals where that court had held that certain sewer tax bills were valid. It was argued by the relators that the statute granting the power to cities of the third class to build sewers required the city to first pass an ordinance fixing the dimensions and prescribing the materials for the sewer and that an ordinance which accepted the best bid and also fixed the dimensions of and prescribed the material for the sewer was not sufficient. The opinion of the court was written by BROWN, J., who stated that upon certiorari the action of the trial court will not be reviewed as upon appeal but that the Supreme Court had been urged by relator to consider the case as if it were on appeal and that relator had raised issues in the

13. (1914) 262 Mo. 535.

case that were not even discussed by the court of appeals in its opinion and had requested a review of evidence that had not been set forth in the opinion. He stated that "practically all of these things are outside of the issues in this case," and that on certiorari the Supreme Court is not concerned with the question whether all of the issues were considered by the court of appeals or whether the court of appeals had failed to follow the decisions of the several courts of appeals. He then held that as this statute had not been construed by the Supreme Court the meaning given to it by the court of appeals would not be held erroneous. He stated: "It is neither appropriate nor necessary for us to decide whether respondents in their opinion complained of have placed a correct construction upon section 5848, Revised Statutes 1899, and we do not decide that point. A judgment of a Court of Appeals can not be quashed by this court by certiorari because it is merely erroneous or places a wrong construction upon a statute or other law."

Judge BROWN intimated in his opinion, however, that the Supreme Court agreed with the Springfield Court of Appeals in holding that the ordinance need not be first passed. In this opinion the entire court concurred, except BOND, J., who concurred in the result. This case seems, therefore, to merely establish the self-evident proposition that under the constitution the power of the Supreme Court exists to quash a decision and judgment of a court of appeals only where it has failed to follow a controlling decision of the Supreme Court, and conversely does not exist where there is no previous controlling decision. Under the constitution the several courts of appeals doubtless have the power to finally dispose of cases of which they have appellate jurisdiction, where there are no previous controlling decisions of the Supreme Court, as they shall deem proper .

The next case upon the subject is *State ex rel. C. R. I. & P. Ry. Co. v. Ellison*.¹⁴ Here the opinion was delivered by BOND, J., who it will be remembered had consistently been of the opinion that the Supreme Court has no constitutional power to issue these

14. (1915) 263 Mo. 509.

writs. His opinion was originally delivered in division one and later was adopted by the court *in banc*. The decision and judgment of the Kansas City Court of Appeals was held not in conflict with prior controlling decisions of the Supreme Court. The question involved in the case was whether the plaintiff in a personal injury suit was, as a matter of law, guilty of contributory negligence. The plaintiff while standing upon a platform of a railroad station, where he had gone to meet his father who was expected to arrive on an incoming train, leaned against a truck which fell because it did not have proper support at one end. The holding of the court of appeals, that the plaintiff who was ignorant of the insufficiency of the supports of the truck was not guilty of contributory negligence as a matter of law, was held not in conflict with the previous controlling decisions of the Supreme Court and particularly with *Kelley v. Lawrence*.¹⁵ The court was also divided in this decision, BROWN and WALKER, JJ., concurred, BLAIR, J., concurred in the result, while GRAVES and FARIS, JJ., dissented. WOODSON, C. J., did not sit. In determining the law as to certiorari this case seems relatively unimportant as neither the power of the court nor the scope of the inquiry was discussed.

The next case decided is *State ex rel. Gilman v. Robertson*.¹⁶ Here the Springfield Court of Appeals had affirmed a judgment where the appellant had neither filed a transcript of the judgment and order granting the appeal nor paid the docket fee. The facts in the case were not disputed. The opinion of the court was delivered by WOODSON, C. J., who at the outset asked this question: "Has this court the constitutional power or authority to review the errors (not the jurisdiction) of the various Courts of Appeals of the State, upon writs of certiorari?" He then stated that while he had not changed his own opinion as to the power of the Supreme Court in these cases, yet he said he deemed it unwise to have the question of jurisdiction frequently agitated and that therefore in recognition of previously decided cases and out of regard for stability of the law he

15. (1906) 195 Mo. 75.

16. (1915) 264 Mo. 681.

considered the question of the power of the Supreme Court to be finally settled in the affirmative. He then held that the court of appeals in affirming the conviction had followed repeated rulings of the Supreme Court. BROWN, J., concurred in the result, GRAVES, WALKER, FARIS and BLAIR, JJ., concurred in the result in a separate opinion by GRAVES, J. BOND, J., dissented. While as stated by one of the judges of the Supreme Court in a later case the case reviewed upon certiorari was of rather slight importance, yet the case in the Supreme Court is of the first importance in determining the law of certiorari as to the power of the court to issue these writs. An elaborate argument in favor of the power was made by Judge GRAVES, and an elaborate argument against it was made by Judge BOND. It seems that counsel who had other cases of the same nature pending before the Supreme Court also filed briefs in this case thereby causing the court to attach to the decision the greatest importance. Judge GRAVES said that he did not concur in Judge WOODSON's opinion to the effect that because the court had previously decided that it had the power to issue these writs the question should be considered settled, but stated that he concurred because he had no doubt about the power of the court under the constitution to issue the writ. He then pointed out that in 1884, when the constitution was amended, creating the Kansas City Court of Appeals and changing the jurisdiction of the St. Louis Court of Appeals and changing a court of appeals from a court of intermediate appellate jurisdiction to a court of final appellate jurisdiction in all cases where an appeal was provided for to a court of appeals, the people determined to leave no doubt upon the question of the power of the Supreme Court and for that reason adopted Section 8, of the amendment of 1884, which provided specifically that "the Supreme Court shall have superintending control over the Courts of Appeals by mandamus, prohibition and certiorari."

Judge GRAVES then argued that specific authority for the use of the writ appears in the constitution in direct connection with the subject of the jurisdiction of these courts, that the language quoted above is susceptible of but one meaning, and that not only

was superintending control given the Supreme Court over courts of appeals, but that the very writs by which the power may be exercised were specified in the constitution. He stated in discussing certiorari, as provided in the constitution, that it can be used to bring up the record in a court of appeals, and that by Section 15 of Article 6 of the constitution the courts of appeals are required to file written opinions in cases decided by them, and that such written opinions "become parts of their record," and that in all events where the opinion of a court of appeals shows that it has gone beyond its authority the Supreme Court may quash the decision because it is rendered without authority and therefore beyond the jurisdiction of a court of appeals. He then pointed out that a court of appeals may commit error in holding that it has jurisdiction when it has not jurisdiction under the constitution and that it may commit an error of judgment where it has jurisdiction; and that in the first class of cases the Supreme Court is the "final arbiter," but in the second class of cases the Supreme Court has no concern. He then stated that if a court of appeals fails to follow controlling decisions of the Supreme Court it exceeds its jurisdiction. His views may probably be best expressed by two brief quotations from his opinion. "If a Court of Appeals in deciding a case fails to follow the last previous ruling of this court upon the doctrine of law or equity involved in the case, the moment such act occurs such court has overstepped its jurisdiction, and is then as much under the superintending control of this court by proper writ as if it had never possessed jurisdiction. The Constitution has created the lines within which such courts must travel in deciding a case, and when such court oversteps these fixed lines, it is exceeding the jurisdiction granted by the Constitution creating the court. Its act is in excess of constitutional and legal authority, and therefore beyond its power or jurisdiction to do."

* * * * *

"The constitution fixes a pathway of decision for these courts. If they get out of that pathway, they are without constitutional power or jurisdiction."

Judge GRAVES' opinion in this case as to the scope of the inquiry upon certiorari, however, is not as important as it is upon the power of the court for, as has been stated, the question involved appeared in the written opinion filed by the court of appeals, and no question, therefore, was before the court as to any part of the record in the court of appeals other than the written opinion. In considering, however what may be reviewed upon certiorari Judge GRAVES' argument as to the nature of the power of the Supreme Court is of first importance as he reviewed the entire judicial system of Missouri as provided for in the constitution. He pointed out that thruout the constitution "runs the idea of harmony in the law" and that it is specifically provided that the Supreme Court has the power to enforce harmony of decision by the courts of Missouri. He stated that it was highly proper that the power should have been given to one of the courts by the constitution because if there had been no such power harmony of decision would have been "but an iridescent dream." Judge GRAVES' argument is also important as to the scope of the inquiry in these cases, because surely it was not intended by the framers of the constitution that whether there should be harmony of decision should depend upon mere form or the language of the written opinion of a court of appeals; but on the contrary, no doubt, substance was intended by the constitutional provisions, that is, actual harmony of decision by the courts of this State.

In his dissenting opinion, Judge BOND concluded that certiorari will not lie where a court of appeals has merely failed to follow the last controlling decision of the Supreme Court, as the framers of the constitution intended courts of appeals to be courts of final appellate jurisdiction, and that by section 8, *supra*, it was intended that the writ should only be issued where under the constitution courts of appeals are prohibited altogether from exercising jurisdiction. He stated that the provision of the constitution to the effect that the last previous ruling of the Supreme Court shall be binding upon the courts of appeals was only intended "to furnish a body of legal doctrine for the use of the courts of appeals, in the decision of causes of which they have final appellate jurisdiction." This view seems to

overlook the fact that Section 6, of the amendment of 1884, after providing that cases should be certified to the Supreme Court by a court of appeals upon its own motion, where any one of the judges shall deem the decision contrary to the previous decision of the Supreme Court or to any one of the courts of appeals, again specifically reiterated the duty of following the decisions of the Supreme Court and stated definitely, "and the last previous rulings of the Supreme Court on any question of law or equity shall, in all cases, be controlling authority in said Courts of Appeals."¹⁷ This view seems also not to give sufficient importance to the fact, as pointed out in the opinion of Judge GRAVES, that Section 8, of the amendment of 1884, specifically provided the means of making the last previous rulings of the Supreme Court controlling authority in the courts of appeals.¹⁸ As to the latter statements, however, Judge BOND's argument is that the writ of certiorari provided for in Section 8, can only be used to review errors of jurisdiction and there is no error of jurisdiction when a court of appeals fails to follow a controlling decision of the Supreme Court. But as we have said the better view of the constitution seems to be that the courts of appeals have not unlimited power in deciding cases even where they have appellate jurisdiction, but are at all events to decide cases, whatever may be their views as to the rules of law to be applied, according to the last previous ruling of the Supreme Court.

The next case decided involved a decision and judgment of the St. Louis Court of Appeals. It is *State ex rel. Kirkwood v. Reynolds*.¹⁹ The St. Louis Court of Appeals had decided that a suit upon a special tax bill is not a suit concerning land, "or whereby the title thereto may be affected," within the meaning of the statute²⁰ and that service of process upon the defendant in such a suit in the City of St. Louis did not give the circuit court of St. Louis county jurisdiction. The defendant claimed, as he did not live in St. Louis county and was not

17. Section 6, of the Amendment of 1884, Constitution of Missouri.

18. Section 8, of the Amendment of 1884, Constitution of Missouri.

19. (1915) 265 Mo. 88.

20. Revised Statutes 1909, § 1753.

served there, that the circuit court of St. Louis county had no jurisdiction and that the statute²¹ providing that in certain cases suit shall be brought where the land lies was not applicable. The court *in banc*, in an opinion written by Judge GRAVES, held that the decision and judgment of the St. Louis Court of Appeals was erroneous and should be quashed; that tho the Supreme Court had not previously decided as Judge GRAVES put it "a grey mule" case, i. e., a case involving the question of venue in a suit upon a special tax bill, yet, it had held suits to enjoin a sale of land under execution and suits to enforce liens against lands to be suits in which the title to the land may be affected, and that a suit to enforce the lien of a special tax bill is of the same nature, and that therefore the principle or rule of law applicable to the situation was not applied by the St. Louis Court of Appeals. All concurred but BOND, J., who dissented as to the jurisdiction of the Supreme Court to issue the writ.

This case seems to hold, what has been previously stated to be the sound holding, that the courts of appeals are bound to follow and apply the principles announced by the Supreme Court, and the mere fact that a particular class of cases has not been decided by the Supreme Court does not leave a court of appeals free to decide such cases in conflict with cases previously decided by the Supreme Court involving the same principle. Under the common-law precedent system we of course determine rules of law, or the principle on which cases should be decided, from cases previously decided and to secure actual harmony of decision in this state the holding in this case was not only proper but necessary.

The next case decided is *State ex rel. National Newspaper Association v. Ellison*,²² in which the decision and judgment of the Kansas City Court of Appeals was quashed. The court of appeals had held in a negligence case that the trial court erred in granting the defendant a new trial where an instruction had been given to the jury which broadened the issues as found

21. Revised Statutes 1909, § 1753.

22. (1915) 176 S. W. 11.

in the petition. The Supreme Court held that the issues could not be broader than those made by the pleadings and that the court of appeals in reversing the ruling of the circuit court in awarding a new trial had failed to follow several previous decisions of the Supreme Court to the effect that the pleadings determine the issues to be submitted to the jury. Judge GRAVES for the court *in banc* held that tho the opinion of the court of appeals set forth the substance of the petition, yet the petition would be looked at "as the petition is just as much a part of the record as is the opinion of the court, and must speak for itself." He also stated that for the facts in this case the Supreme Court would look to the opinion of the court of appeals. Here we find a case to the effect that the record in the court of appeals is the record in the Supreme Court, for the purpose of determining whether a court of appeals has decided the case according to the controlling decisions of the Supreme Court, and it would seem that the Supreme Court had in so holding taken a more liberal view as to what would be examined upon certiorari than was indicated by the language of the writer of the opinion in *State ex rel. Jones v. Robertson*²³ and in *State ex rel. United Railways Company v. Reynolds*.²⁴ In this respect the decision seems thoroly sound as the whole purpose of issuing the writ is to establish actual harmony of judicial decision and to bring about actual uniformity of the law in this state. All concurred in this opinion except BROWN and BOND, JJ., who dissented, and BLAIR, J., who did not sit. BOND, J., dissented upon the question of jurisdiction only. It does not appear upon what ground BROWN, J., dissented, tho it will be remembered that he had previously said the opinion of the court of appeals would be taken by the Supreme Court as to what are the pleadings in the case. Whether it was actually necessary for the Supreme Court to know the language of the petition we are unable to say because, as Judge GRAVES states, the substance of the petition is set forth in the opinion of the court of appeals.

23. (1914) 262 Mo. 535.

24. (1914) 257 Mo. 19.

The next case decided by the Supreme Court is *State ex rel. Delano v. Ellison*.²⁵ This was a personal injury case in which a court of appeals had affirmed a judgment for the plaintiff who was injured by a collision with a railroad engine while driving over a public crossing. It was contended by the relator that the plaintiff in the personal injury case was as a matter of law guilty of contributory negligence as the physical facts showed he could have seen the train in time to have avoided the collision, and that his evidence to the contrary was of that character which the Supreme Court had previously held had no probative value and did not raise an issue of fact; and further that the trial court committed error in giving two instructions on behalf of plaintiff, one of which it was claimed wholly excluded the defense of contributory negligence and the other, it was claimed, left the case to the jury without limitation as to the acts of negligence they might consider in determining whether defendant was negligent. The Supreme Court in an opinion by REVELLE, J., held that the Kansas City Court of Appeals had followed the decisions of the Supreme Court on all three questions; first, that there was a conflict in the evidence having probative value as to whether plaintiff could have seen the train; second, that the error complained of in the instructions was cured by other instructions in the case which made it plain to the jury that contributory negligence was a defense; third, that the jury were limited in their consideration to a single charge of negligence, viz., failure upon the part of the defendant, who was operating a railroad, to give the statutory signals for the crossing. Judge REVELLE stated that upon certiorari the record in the court of appeals will be examined to determine whether the evidence showed that plaintiff was guilty of contributory negligence as a matter of law, that is, to determine whether there was legal evidence upon which the case should have been submitted to the jury by the trial court; and also that the abstract of the record in the court of appeals should be examined to determine whether the instructions contained the errors alleged by relator upon certiorari. The opinion of the court of appeals in

25. (1915) 181 S. W. 78.

the case contained a part of the evidence but it did not set forth the instructions complained of or the substance thereof. At the outset of the opinion Judge REVELLE asked this question: "At what can we look, and by what must we be governed in determining whether the Courts of Appeals have acted within the bounds of their jurisdiction, or in contravention of the decisions of this court?" He answered it by stating that the Supreme Court could only have recourse to the record of a court of appeals. He then cited authorities sustaining the proposition that according to common law principles certiorari brought up the record of the lower tribunal in order that the higher tribunal may "determine whether the inferior court has acted legally and within its jurisdiction," and that whatever constituted the record in the case is brought up. He then applied that general principle to the case where the writ is issued by the Supreme Court to a court of appeals and concluded that the whole record should be examined to determine two questions, viz., whether the court of appeals had decided a case of which the Supreme Court had exclusive jurisdiction and whether the court of appeals had followed controlling decisions of the Supreme Court. He also stated that there is no distinction, so far as the scope of the inquiry goes, as to the record proper and the record in the court of appeals, that by statute the bill of exceptions becomes part of the record and that the matter contained in the bill of exceptions constitutes a part of the record in the court of appeals. He also stated that to merely look at the written opinion of the court of appeals would frequently be of no effect in determining whether actually the decisions of the Supreme Court had been followed, and that the Supreme Court could not tell whether its rulings had in fact been followed, "when we cannot know the facts and subjects upon which the other courts have passed, cannot see or understand the matters to which they had either applied or failed to apply the law as declared by this court." He then stated what he understood the rule should be in this language: "My position is that, for the sole purpose of ascertaining and determining whether they have done either of these two forbidden things, we are not only authorized, but

required, by both the written law and the necessities of the case, to examine and consider their whole records,—the records to which they have applied the law and upon which they have decided. We will not examine the record for the purpose of determining the credibility of witnesses, or the weight to be given to conflicting testimony in cases of either law or equity, nor for determining whether the Court of Appeals has committed any error, save and except the two matters herein mentioned.”

WOODSON, C. J., and BLAIR, J., concurred in the views of REVELLE, J., as to the scope of the inquiry, but dissented as to the result reached. GRAVES, J., dissented but expressed no opinion as to the views expressed. BOND, J., concurred for the reasons stated in *State ex rel. v. Robertson*.²⁶ FARIS, J., concurred in a separate opinion. WALKER, J., concurred in the result. It is to be seen, therefore, that Judge Revelle's statements as to the scope of the inquiry represented the views of three members of the court, two of whom disagreed with him as to the result reached. Judge GRAVES evidently was of the opinion that even under a narrower view as to the scope of the writ the decision and judgment of the court of appeals should have been quashed. The opinion of FARIS, J., is devoted to a discussion of the scope of the inquiry upon certiorari. He disagreed with Judges REVELLE, WOODSON and BLAIR, as to the use of certiorari in these cases. He stated that in his opinion under the constitution the Supreme Court has nothing to do with the correctness or incorrectness of the decisions of courts of appeals, that under the constitution the Supreme Court is required not to interfere “so long as the abstract rules of law which they announce in their opinions run with, and not contrary to, our own antecedent pronouncements.” He then concluded that the rules as to the use or scope of the common law writ of certiorari are of no particular importance, as under the constitution there is no right of appeal from a court of appeals to the Supreme Court, and that it was the intention of the framers of the constitution, “to cut off at the root the right of ap-

26. (1915) 264 Mo. 661.

peal from a Court of Appeals to this Court." He did state, however, as has been indicated, that the writ should issue to compel uniformity of decision where lack of it shall "appear upon the face of an opinion of a Court of Appeals," and that the use of the writ under the constitution was warranted in such cases. He concluded that this is the only purpose for which the writ may be issued by the Supreme Court; "even though a rank miscarriage of justice may have occurred, the law is yet the same in one county that it is in another, and the mandate of the Constitution and the intent thereof are fulfilled."

This view seems untenable. Surely the extraordinary remedy of certiorari was not given in the constitution to enforce mere apparent uniformity of decision. The constitution states that Supreme Court decisions "shall be controlling authority in said courts of appeals," and the writ of certiorari specifically was provided in the same connection and was not restricted or limited by any language in the constitution. The views of this learned judge seem further to fail to recognize that the Supreme Court is doing a different thing when it is determining whether a court of appeals has followed the last controlling decision of the Supreme Court than it is doing when it is reviewing the action of a trial court upon writ of error or statutory appeal. It may well be as we have already seen in *State ex rel. Jones v. Robertson*²⁷ that a court of appeals may decide erroneously and yet not fail to follow a controlling decision of the Supreme Court. If there be no controlling decision of the Supreme Court and if the action be one of which the Supreme Court has not exclusive appellate jurisdiction a court of appeals has power to decide incorrectly, and if it were contended that the Supreme Court had the power to quash an erroneous decision of this character Judge FARIS' observations would be true, that there is a failure to recognize that the constitution cut off the right of appeal from a court of appeals to the Supreme Court.

The next case decided is *State ex rel. Pedigo v. Robertson*.²⁸ In this case the writ was issued to the Springfield Court

27. (1914) 262 Mo. 535.

28. (1915) 181 S. W. 987.

of Appeals but was quashed upon final hearing by the court *in banc* in an opinion by FARIS, J. The Springfield Court of Appeals had affirmed a conviction of a trial court in the criminal case of *State v. Pedigo*.²⁹ In response to a preliminary writ of certiorari the court of appeals returned the printed abstract of the record filed in the court of appeals containing all of the proceedings of the trial court, and stated in the return that a copy of the opinion had been filed in the Supreme Court at the time of the application for the preliminary writ. Upon final hearing of the case in the Supreme Court the relator filed nothing but a brief which contained a printed argument only. Judge FARIS held that the writ should not issue as the relator had not complied with Rule 35, adopted April 2, 1914, requiring in cases begun in the Supreme Court by extraordinary writs that the parties suing out the writ shall file "printed abstracts and briefs" as is required in appeals and writs of error in other civil suits. He stated that "not a word of record" had been printed and that the rule (Rule 13) requires in civil cases that as much of the record should be printed "as is necessary to a full and complete understanding of all the questions presented to this court for decision." Judge FARIS then discussed elaborately, first, what constitutes the record in a court of appeals and, second, the necessity for bringing up the matter contained in the bill of exceptions in cases decided by a court of appeals. He concluded that under the practice in certiorari at common law the evidence and matter contained in a bill of exceptions may be brought up and should be included in the return and that it is part of the record in the cause. As to this he stated "the rule is that a Bill of Exceptions timely made and filed in a case becomes thereupon and thereafter a part of the record in the case." He stated, however, that this disposition of the "academic question" as to what constitutes the record in a case does not determine the broader question of the power and authority of the Supreme Court. And to determine that question he pertinently asked: "Can we use the evidence after it gets here? Have we power to go over it and weigh it? If we

29. (1915) 176 S. W. 556.

have not—if our own holdings and well-settled rules admonish us we have not—why do the vain and futile thing of requiring the bill of exceptions to come up?” He then stated, for the reasons assigned by him in his opinion in *State ex rel. Gilman v. Robertson*,³⁰ that he concluded the Supreme Court has only power to quash the decision and judgment of a court of appeals where the face of the opinion or decision contains a rule of law in conflict with the controlling decisions of the Supreme Court, consequently the Supreme Court has no use whatever for the evidence or other matter contained in the bill of exceptions. He also raised the question whether to comply with Rule 35 of the Supreme Court, it is necessary to again print an abstract of the proceedings in the trial court or whether the relator may use the abstract of the record filed in a court of appeals. He concluded by saying that the question need not be decided, as the case under consideration was a criminal case, and that in criminal cases the statutes of this state require the clerk of the court below to send up to the appellate court a complete transcript of the proceedings below including the bill of exceptions. Finally Judge FARIS concluded that as none of the record was printed and filed in the Supreme Court, not even the opinion and judgment of the court of appeals, the writ should be dismissed for failure to comply with the rules of the Supreme Court. WALKER, J., concurred. GRAVES and BOND, JJ., concurred in the result and BLAIR, J., concurred in the result, and in those paragraphs which held that the Supreme Court upon its own motion had the power to dismiss the writ for failure to comply with the rules of the court, and that the rule had in fact not been complied with. REVELLE, J., wrote a separate opinion, in which WOODSON, C. J., concurred, in which he concurred in the same paragraphs, but not in the statements in the paragraph which dealt with the power of the court and the scope of its inquiry upon certiorari to a court of appeals. He pointed out, first, that upon certiorari, as in any other case before the Supreme Court, the court should only review such matters as are necessary to a correct determination of the question before the

30. (1915) 264 Mo. 661.

court; and second, that the evidence upon which the lower court acted will be treated as a part of the record, if it is necessary to know upon what the lower court acted, to determine whether the court, whose decision is under review, proceeded legally and within its authority; and, third, that the constitutional provision requiring courts of appeals to follow the controlling decisions of the Supreme Court do not mean merely that "the written opinions of the Courts of Appeals shall be so framed and prepared as to avoid the open appearances of a conflict with our previous decisions," but on the contrary they mean that the actual decision in the case decided by the court of appeals shall be according to the controlling decisions of the Supreme Court.

Judge REVELLE then stated that there seems to be no necessity of printing and filing in civil cases brought to the Supreme Court on certiorari another abstract of the proceedings in the trial court, that the bill of exceptions, filed below, being a part of the record when printed and filed in an appellate court, should be considered the record for all purposes and should be so used. As to the latter question Judge REVELLE's opinion especially commends itself. Assuming that the Supreme Court will look at the matters and things contained in a bill of exceptions there seems to be no reason whatever for requiring litigants to incur double expense and again print the bill of exceptions and proceedings upon which the court of appeals decided the case. The rule of the Supreme Court requiring printed abstracts in these cases should receive that interpretation.

So all that can be said as to the actual decision in this case is that the relator in certiorari cases must comply with the rules of the Supreme Court as to printing abstracts, etc., or the court may dismiss the case of its own volition. The opinions, however, are interesting as they shed light upon the difference of opinion that existed as to the power of the Supreme Court upon certiorari to compel harmonious decision by courts of appeals in administering the rules of law and equity. At this juncture it may be remarked that it seems from reading these opinions that too much has been made of the argument that courts of general jurisdiction have the power to decide incorrectly—to commit error in deciding cases. It is true no doubt

that a court of general jurisdiction, limited in no way, has the power to err in its decision and that by committing error it does not exceed its jurisdiction; but under the constitution of Missouri the power of courts of appeals is not unlimited, but on the contrary is expressly limited by a mandate to follow the last previous decisions of the Supreme Court on the rule of law on the question, and if a court of appeals fails to follow and apply such last controlling decision it exceeds its power and authority and therefore commits an error of jurisdiction. A court of appeals has no power or authority to decide that the last decision of the Supreme Court is not binding and controlling and therefore it would seem it has not the power or authority to decide a given case in conflict with the last controlling decision of the Supreme Court. The important question, therefore, under the constitutional provision, as to the controlling decisions of the Supreme Court, is whether a court of appeals or a single judge thereof shall determine whether there is a conflict, or whether something more was meant—whether the Supreme Court was given the authority by the extraordinary writs of certiorari and mandamus to compel courts of appeals to follow the last controlling decisions of the Supreme Court. Once having determined that the makers of the constitution intended to give the Supreme Court authority to compel the courts of appeals by the extraordinary writ of certiorari, to follow controlling decisions of the Supreme Court, the sound conclusion seems to be that the writ is being used to determine whether a court of appeals has exceeded its power or jurisdiction, and is not being used to revise and review the decision of a tribunal that has unlimited and final appellate jurisdiction; and is not being used to secure a second appellate review in the Supreme Court, of cases decided by the courts of appeals, as if upon writ of error or appeal. If the constitution requires courts of appeals to follow the last controlling decisions of the Supreme Court, and if it gives the Supreme Court the right to issue the writ of certiorari to a court of appeals to bring the case into the Supreme Court, that court in quashing a decision and judgment of a court of appeals is not correcting mere error of decision of a court of appeals, but

on the contrary, is annulling a decision and judgment which a court of appeals has no power under the constitution to make. We conclude, therefore, that a decision of a court of appeals contrary to the last controlling decision of the Supreme Court is beyond the jurisdiction of a court of appeals, and that the power to determine whether it is in conflict with prior Supreme Court decisions and beyond the jurisdiction of a court of appeals is not exclusively vested in the courts of appeals but is vested finally in the Supreme Court as the head of the judicial system of the State.

The next case decided is *State ex rel. St. Louis, etc., Ry. Co. v. Nortoni*.³¹ In this case too the preliminary writ of certiorari issued to the St. Louis Court of Appeals was quashed by the court *in banc* in an opinion by WALKER, J. The St. Louis Court of Appeals had held that the St. Louis & Hannibal Railway Company was not liable as an interstate carrier of live stock under the Carmack Amendment to the Interstate Commerce Law of the United States, and that it could not successfully defend upon the ground that no notice of loss or injury had been given to it by the shipper as was provided in the bill of lading. The requirement for this notice was not binding if the shipment was not an interstate shipment. The facts in the case as stated by the court of appeals disclose "that the shippers consigned the hogs at Perry, Mo., to the relator to be shipped to Gilmore, thence to be delivered to the Wabash Railroad as a connecting carrier for transportation to East St. Louis." The answer of the defendant in the case stood admitted, wherein it was alleged that there was "a special contract with the plaintiffs to the effect that the relator undertook to transport the hogs only to the terminus of its own line at Gilmore, Mo." Judge WALKER, after considering several previous decisions of the Supreme Court as to interstate shipments, held that the decision of the St. Louis Court of Appeals was not in conflict with the decisions of the Supreme Court on the matter under review. In these views GRAVES and BLAIR, JJ., concurred. BOND and FARIS, JJ., concurred in the result.

31. (1915) 181 S. W. 995.

WOODSON, C. J., dissented upon the ground that the shipment was an interstate shipment, but did not point out the controlling decisions of the Supreme Court to that effect. REVELLE, J., concurred in the opinion of WOODSON, C. J.

The next case decided is the case of *State ex rel. Southwestern National Bank, etc., v. Ellison*.³² In this case the opinion and decision of the Kansas City Court of Appeals was quashed upon final order of the Supreme Court *in banc* in an opinion by REVELLE, J. The court of appeals in a mechanic's lien suit had held that it could not review the ruling of the trial court upon a motion to strike out a petition where the motion contained three grounds; first, that the record showed on its face that plaintiff's right to a lien had expired by lapse of time; second, that plaintiff had not sued the persons who contracted the debt upon which the lien was based; third, that the members of a certain partnership had not been made parties defendant. The trial court heard evidence upon the motion but put its ruling upon the first ground. The court of appeals declined to review the action of the lower court because neither a motion for a new trial nor a bill of exceptions had been filed. The Supreme Court held that where a motion to strike out is made on several grounds, but is sustained only on the ground that the record shows on its face that the plaintiff's right to recover had expired by lapse of time, the motion is in effect a demurrer; and that the view taken by the court of appeals was contrary to several decisions of the Supreme Court to that effect and consequently that the ruling of the trial court should have been reviewed by the court of appeals though no motion for a new trial nor bill of exceptions had been filed. In the course of the opinion Judge REVELLE distinctly stated that it was not the province of the Supreme Court in these cases "to determine how the court of appeals shall decide the various questions involved in this record," but only to determine whether previous controlling decisions of the Supreme Court have been followed. WOODSON, C. J., BLAIR, FARIS and GRAVES, JJ., concurred. WALKER, J., concurred in the result. BOND, J., dis-

sented. In this opinion, which was concurred in by all of the judges but two, the distinction is made between issuing the writ of certiorari to determine whether a court of appeals has followed previous controlling decisions of the Supreme Court, and reviewing, as by error or appeal, the decision of a court of appeals to determine whether it has held correctly as to the proceedings in a trial court from which an appeal has been taken.

The next case to be considered is *State ex rel. O'Malley v. Reynolds*.⁸³ Here the writ was issued to the St. Louis Court of Appeals but the preliminary writ was quashed upon final hearing. The Supreme Court held that the court of appeals followed controlling decisions of the Supreme Court in a mechanic's lien suit. BLAIR, J., writing the opinion for the court said: "Not being asked to go beyond the opinion of that court for the facts the question whether we can do so is not involved." All concurred except BOND, J., who concurred in the result only. The decision of the Supreme Court seems not particularly significant, yet, from the above statement by Judge BLAIR, we infer that the question, as to whether the facts upon which the court of appeals acted may be examined, has not been finally settled.

The next case that we desire to call attention to is *State ex rel. Schmoll v. Ellison*,⁸⁴ which was decided the same day the last case discussed was decided. Here the writ was issued to the Kansas City Court of Appeals and the decision and judgment of that court quashed. The opinion of the Supreme Court is by GRAVES, J., and all the court concurred but BOND, J., who dissented. The court of appeals in a suit upon an accident policy issued to the plaintiff held that there was no liability where the plaintiff's mother was killed by accidentally falling from the platform of a moving passenger coach. There was issued to the plaintiff a policy naming the plaintiff's mother as beneficiary which insured against plaintiff's death from injury sustained "while a passenger in or on a public conveyance provided by a common carrier for passenger service (including the

83. (1915) 182 S. W. 743.

84. (1915) 182 S. W. 740.

platform, steps or running board of railway or street railway car)"; and there was also issued at the same time and covered by the same premium a supplemental policy on a separate document, separately signed, covering the life of the plaintiff's mother naming the plaintiff as beneficiary and insuring against accidents to her "while riding as a passenger in a railway passenger car." The court of appeals held this to be one contract and that reading the main and supplemental parts thereof together the insurance company was not liable, that there was only to be liability upon the insurance company where the mother was inside the passenger coach; that this was true because there was specific language in the policy imposing liability in the event of death or injury to plaintiff, while riding on a platform, and an absence of such specific language in describing the liability which should exist in a case of the death of the plaintiff's mother, and that the entire contract therefore showed that the parties intended that there should be liability only in the instances covered by the very words of the policy. The court of appeals concluded that if the instruments were not one contract a fair interpretation of the supplemental contract imposed liability for the death of the mother while on the platform of the passenger coach. The Supreme Court held that the rule of law applied in the case by the court of appeals, to the effect that the documents were legally one contract, was inconsistent with previous decisions of the Supreme Court in two cases where the same principle was involved, and therefore that the decision and judgment of the court of appeals should be quashed. Judge GRAVES in delivering the opinion of the court said: "If they entrench upon the decisions of this court in holding the two instruments to be one contract, as we hold, it necessarily follows that their judgment should be quashed; and it is so ordered." Nothing more is meant by this language, we think, than had been previously stated by the same judge in the opinion in *State ex rel. Kirkwood v. Reynolds*,³⁵ which he wrote for the court, wherein it was held that it is not necessary that the conflict exist with a prior decision of the Su-

35. (1915) 265 Mo. 88.

preme Court where the facts are the same as in the case under review, but that the important question is, has the rule of law applicable to the situation been previously settled by the Supreme Court *contra* to the decision of the court of appeals.

State ex rel. Grear v. Ellison,³⁶ was also decided at the same time that the two preceding cases were decided. In this case the preliminary writ issued to the Kansas City Court of Appeals was quashed on final hearing. The question before the court of appeals arose in a personal injury suit where the plaintiff had been struck by a street car. The action was founded upon negligence of the agents of the street car company in not reversing the power of the car and upon the humanitarian doctrine. The court of appeals had held that there was no negligence of the motorman in not reversing the power, and that the case on its facts was not one for the application of the humanitarian doctrine; that the motorman of the car had the right to assume that the injured man would not thrust himself in a situation of visible danger, and that he did in this case recklessly thrust himself in a situation of obvious danger and that no act of the motorman could have prevented the collision. In stating the humanitarian doctrine the court of appeals used the phrase "reasonable care" in describing defendant's duty, and the plaintiff claimed that the Supreme Court in *Lyons v. Metropolitan Railway*³⁷ had held it was the defendant's duty "to use all reasonable efforts" consistent with the safety of the passengers to avoid a collision. The Supreme Court held that in a great majority of the cases the term "ordinary care" had been used to define the defendant's duty, and that in some cases "reasonable care" had been used, that the two expressions meant the same thing, and that such was the meaning of the above language in *Lyons v. Metropolitan Railway*. The court held that the principle of the so-called humanitarian doctrine cases had not been incorrectly applied by the Kansas City Court of Appeals. FARIS, J., delivered the opinion of the Supreme Court and in the course of a discussion of the opinion of the Kansas City Court of

36. (1915) 182 S. W. 961.

37. (1913) 253 Mo. 143.

Appeals he said, "The Constitution does not make us arbiters of their rhetoric and diction." He further held that the court of appeals had followed the previous rulings of the Supreme Court, in holding it was negligence on the part of plaintiff to drive a smoothly shod horse, on a dark morning, over a sleet covered street, on a down grade, at a slow trot, to a point within thirty-five feet of a street car track, and that this holding did not violate the rule previously established by decisions of the Supreme Court that ordinarily one is not required to look out for danger, but pointed out that the rule is not applicable to one approaching a place of danger such as a railroad track. The court also held that the fact that the brakes of the street car were out of order didn't change the situation, that a plaintiff claiming the benefit of the humanitarian rule had no right to demand that perfectly equipped cars be run, but could only complain of the failure of the motorman to exercise ordinary care in handling the particular car, to avoid injuring him after seeing him in a position of danger, or after he might have seen him by the exercise of ordinary care. GRAVES and WALKER, JJ., concurred. BOND, J., concurred in the result. BLAIR and REVELLE, JJ., dissented. WOODSON, C. J., dissented in a separate opinion. WOODSON, C. J., dissented upon the ground that the evidence tended to show that the motorman was negligent in not reversing the power; that the evidence tended to show the brakes were out of repair, and that the plaintiff had the right to assume that they were in good order when approaching the track and that the car could be stopped; and that under proper instructions the case should have been submitted to a jury to determine whether the plaintiff was guilty of contributory negligence and whether the motorman was guilty of negligence in not reversing the power. The case contains no discussion of the power of the court to issue certiorari to a court of appeals or the scope of the inquiry upon the issuance of the preliminary writ of certiorari.

The next case passed upon by the Supreme Court is *State ex rel. Tiffany v. Ellison*.³⁸ In this case the judgment of the

38. (1916) 182 S. W. 996.

Kansas City Court of Appeals was quashed which had affirmed a judgment of the trial court in a suit by Mary Coffey against Tiffany and Howard. The plaintiff had recovered a judgment for \$10,000, which was reduced to \$7500 by remittitur, for injury to her eyes caused by the alleged negligence of the defendant, Howard, an oculist. It was urged that the court of appeals in affirming the judgment failed to follow controlling decisions of the Supreme Court upon several questions involved. At the outset of the opinion of the Supreme Court delivered by GRAVES, J., in which WOODSON, C. J., FARIS and BLAIR, JJ., concurred, he stated that tho counsel for respondent had vigorously attacked the right of the Supreme Court to issue a writ of certiorari to a court of appeals, in a case wherein the judgment of the court of appeals is at variance with previous controlling decisions of the Supreme Court, yet the Supreme Court was satisfied with the decision it reached in *State ex rel. Curtis v. Broaddus*,³⁹ wherein it was first decided that under the constitution the Supreme Court has power to issue a writ of certiorari in such a case, and with the decision in *State ex rel. Gilman v. Robertson*,⁴⁰ wherein the same result was reached after hearing arguments by various counsel attacking the power of the Supreme Court to issue these writs. Judge GRAVES concluded that the constitutional authority of the Supreme Court to quash a judgment of a court of appeals in these cases is undoubted, and that while the members of the court may differ as to what will be considered in determining whether a court of appeals has failed to follow the last previous ruling of the Supreme Court, the members of the court "are firmly fixed upon the question of our constitutional authority to act." Judge GRAVES then stated that in disposing of the case the court confined itself to the facts found by the court of appeals in its opinion and that therefore, "it will not be necessary to tread upon any disputed ground." He pointed out that there is a presumption that a court of appeals correctly states all the necessary facts and remarked that such a pre-

39. (1911) 238 Mo. 189.

40. (1915) 264 Mo. 661.

sumption may not represent the true situation in a particular case; and later stated in the course of his opinion that the court of appeals did not state all the important facts in their written opinion in the very case under consideration.

It seems from the opinion of the Supreme Court, in which is quoted an extract from the opinion of the court of appeals, that the plaintiff was a patient of Dr. Tiffany, an oculist, but that she had been treated in Dr. Tiffany's absence by defendant Dr. Howard for Dr. Tiffany. The principal contention in the case was that, over objection at the trial, incompetent testimony of a process server was admitted of statements made by an office girl employed by Dr. Tiffany. These oculists occupied offices in the same building, Dr. Howard having an office down stairs and Dr. Tiffany up stairs. Dr. Tiffany was not in at the time the papers were served on Dr. Howard and the process server testified that after the papers were served Dr. Howard called up stairs (so the opinion of the court of appeals states) to Dr. Tiffany's office girl and asked "if she had a record of the Mary Coffey case" and that the office girl answered that she had and stated that Mary Coffey "was the school teacher that he dropped iodine in her eye and put it out," and that Dr. Howard who was standing by the process server said nothing. The court of appeals held that this evidence was properly admitted by the trial court. The majority of the Supreme Court held that in so holding the court of appeals had failed to follow many controlling decisions of the Supreme Court announced in cases involving the same principle relating to the admission of such testimony and that the failure to deny the statement of the office girl was not an admission of negligence because: "(1) The physical situation of the parties did not demand a denial; (2) the relationship of the girl to the co-defendant, who might have adverse interests, did not demand a denial; (3) the statement, if made (a matter we seriously doubt), was one not called for by the question, and was therefore purely voluntary, and in the highest degree an impertinence; (4) Dr. Howard, even if in a physical situation where a protest might seem to be expected, still had the right to consider his own interests in the controversy, and for

that reason alone decline to reply." Judge GRAVES however pointed out, by quoting at length from the abstract of the record filed in the court of appeals, that the process server was not sure whether the alleged conversation was had by Dr. Howard talking to the girl up the stairway, or thru a speaking tube, and stated that in a very close case it might be very important to know whether the conversation was had thru a speaking tube or whether it was had by one person talking to another who was at the top of a stairway. He stated that he recited the record of the court of appeals for the purpose of demonstrating that the legal presumption that the court states all the necessary facts may not at all times represent the true situation and that he quoted from the record for no other reason.

It was also urged upon the Supreme Court that the facts in the case failed to show that the injury to plaintiff's eyes was due to any act of either of the defendants. As to that matter Judge GRAVES said there was "much substance in the contention," and that he would discuss it "if we had in the court of appeals opinion all of the facts upon the issue," notwithstanding that the majority of the court had concluded that the judgment of the court of appeals would have to be quashed because of the erroneous ruling as to the admission of the testimony of the process server. He stated, that as the case would have to be sent back for a new trial, it was not desirable to express an opinion upon the sufficiency of the evidence in the first trial. He concluded his opinion with the statement that tho the court had confined itself to the facts stated in the opinion of the court of appeals yet it had read the entire record and had its own impression as to the facts therein. BOND, J., dissented because he thought the Supreme Court was without jurisdiction; REVELLE, J., did not sit. WALKER, J., dissented in an opinion in which he concluded that upon certiorari issued to the court of appeals the Supreme Court would limit its review to an examination of the court of appeals' opinion. He stated that the writ is much more limited than the common law writ of certiorari, that the power to issue the writ would

not exist were it not for the constitutional provision, and that the constitutional provision authorizes a review only under limited conditions. He stated that the conditions are limited because a court of appeals is a court of complete appellate jurisdiction in cases where it has jurisdiction and that to hold otherwise would be "to question the integrity of the judgment of the court of appeals." It is difficult to find any limitation in the constitution upon the writ as authorized to be issued to a court of appeals, either expressly or by implication, and to say that a court of appeals is a court of complete or final appellate jurisdiction seems to assume the very point under discussion; and to say that the writ should not be issued because to do so would question the integrity of the judgment of the court of appeals seems neither very exact nor decisive of the question. Failure on the part of a court of appeals to correctly state the facts in a given case may occur from the same reasons which cause a court of appeals to fail to correctly state and apply the rule of law previously announced by the Supreme Court; and if it is necessary to know what the facts actually are in order to determine whether the case has been decided according to the controlling decisions of the Supreme Court no valid reason is seen why the Supreme Court may not determine whether the facts have been correctly stated by a court of appeals. Judge WALKER was of the opinion that the testimony of the process server was admissible according to the controlling decisions of the Supreme Court.

In *State ex rel. Majestic Mfg. Co. v. Reynolds*,⁴¹ where the writ was issued to the St. Louis Court of Appeals, the writ was quashed upon full hearing because it was held that there was no previous controlling decision of the Supreme Court construing the statute which provides for guarding and fencing machinery.⁴² The court in an opinion by FARIS, J., declared that under the settled decisions of the Supreme Court a court of appeals has jurisdiction in the first instance "to construe authoritatively" any statute, and that the Supreme Court

41. (1916) 186 S. W. 1072.

42. Revised Statutes 1909, § 7828.

has no constitutional authority to interfere even tho in its opinion the construction given the statute by the court of appeals is erroneous. He further pointed out that the Supreme Court does not render judgment in the case brought up upon certiorari but sustains or quashes, as the case may be, what has been done by the court of appeals. He made a distinction between cases so brought up to the Supreme Court and cases transferred to the Supreme Court by a court of appeals and pointed out that the latter cases are dealt with in the Supreme Court as tho they had been taken there by appeal or error.

At the same time the last case was decided the Supreme Court also decided *State ex rel. Thompson v. Reynolds*.⁴³ The St. Louis Court of Appeals had held defendant liable upon an agreement to take stock in a land corporation where he had not signed the articles of association but had authorized an agent to act for him in forming the corporation. The relator upon certiorari claimed that in so holding the court of appeals had not followed a controlling decision of the Supreme Court, viz., *Sedalia, Warsaw & Southern Railway Co. v. Wilkerson*,⁴⁴ in which the Supreme Court had held defendant who had not signed the articles of association of a railroad corporation was not liable and that a contract attempting to bind him before the company was organized was not obligatory. Judge Blair said no attempt would be made to distinguish the statute construed in the Wilkerson case from the statute under which the land company was organized, but, said he, "we are to determine whether it is the law that one bound by a contract whereby he subscribes a named amount of stock in a business corporation he assists in originating and which he authorizes his agents and attorneys in fact to bring into existence, can after such attorneys in fact and agents have organized the corporation, pursuant to his written authorization so to do, repudiate his contract, abandon his associates, take the benefit of the common enterprise, and escape liability." He concluded that

43. (1916) 186 S. W. 1057.

44. (1884) 83 Mo. 235. On the subject of preliminary stock subscription agreements, see Hudson, *Preliminary Stock Subscription Agreements In Missouri*, 9 Law Series, Missouri Bulletin, p. 3.

according to the sound rule one is bound who, before the corporation is organized, authorizes another to take stock for him in a corporation to be organized. He cited in support of this conclusion a court of appeals decision and an encyclopedia of law, and said as to the *Wilkerson* case: "The authorities referred to lead to the conclusion that, at all events, the decision in the *Wilkerson* case, in so far as its conflicts with this holding, should be overruled. At least its application should be restricted to the particular facts in judgment in that case."

If the *Wilkerson* case was in point it would seem that the court of appeals was bound under the constitution to follow it. It is of course not for a court of appeals to decide that the last controlling decision of the Supreme Court is unsound, but if for any reason the last controlling decision of the Supreme Court has not been followed by a court of appeals, and a preliminary writ of certiorari has been issued by the Supreme Court, the Supreme Court should, if it concludes that its controlling decision not followed is unsound, decline to use the power given it by the constitution to quash the judgment of the court of appeals because the judgment of the court of appeals is held correct. To hold that the judgment of a court of appeals should be quashed tho conceded to be sound would be folly. Nothing in the constitution requires the Supreme Court to quash a judgment of a court of appeals which the Supreme Court considers correct. The right to quash is given, but no obligation is put upon the court to use the writ to do injustice. In *State ex rel. Zehnder v. Robertson*,⁴⁵ supra, Judge Graves, it will be recalled, said upon certiorari that the Supreme Court would not quash a judgment of a court of appeals that had followed the controlling Supreme Court decision and would not re-examine the Supreme Court decision to determine whether it is sound. In that case the court was asked to hold its previous decision wrong and to quash the judgment of a court of appeals that had followed it. It declined to consider whether its last previous ruling was sound. In *State ex rel. Thompson v. Reynolds*,⁴⁶ supra, the court was in effect asked to determine be-

45. (1914) 262 Mo. 613.

46. Professor Hudson has discussed the effect of this decision in this number of the Law Series, p. 76.

fore quashing the judgment of a court of appeals whether the last controlling decision claimed not to have been applied was correct. It did consider whether the controlling decision was correct and having concluded it was incorrect declined to quash the judgment. In the one case a court of appeals had followed a controlling decision of the Supreme Court, so its decision and judgment was not interfered with, in the other, it had not done so, we may grant, and had thereby violated the constitutional mandate, yet the Supreme Court declined to quash it as it concluded the decision not followed was unsound. In the former case it probably had no power under the constitution to interfere with the judgment of the court of appeals as it had obeyed the constitutional mandate. In the latter case it merely declined to exercise its power where injustice would result. The cases therefore are distinguishable and each is sound and in accord with settled principles governing the use of the extraordinary legal remedies.

At the same time the last case was decided, the Supreme Court also decided *State ex rel. Atchison T. & S. F. Ry. Co. v. Ellison*,⁴⁷ and quashed the decision and judgment of the Kansas City Court of Appeals because it had not followed previous controlling decisions of the Supreme Court, relating to the power of a circuit court to grant a new trial upon the ground that a verdict for punitive damages is against the weight of the evidence. In a suit for wrongfully ejecting a passenger the jury had returned a verdict for \$5 actual damages and \$500 punitive damages. The trial court ruled that it would award a new trial unless the plaintiff remitted \$400 from the verdict for punitive damages. The court of appeals held the circuit court committed error and that a verdict for punitive damages should not be disturbed as to the amount by the trial court, "except it be so disproportionate to the wrong committed by the defendant as to strike all reasonable men that the jury, in fixing upon the sum found, have acted corruptly, or from passion and prejudice." The Supreme Court held that the court of

47. (1916) 186 S. W. 1075.

appeals applied an improper test as to the power of the circuit court; that there is no difference "between a verdict which is not supported by the evidence as to the amount thereof, and one which is not supported by the evidence at all", and that the action of the trial court will not be disturbed where it sets aside a verdict as excessive, if there is any substantial evidence to support its action, and that in this case there was substantial evidence to support the action of the trial court. The Supreme Court was urged by relator to enter judgment in the case but it held that it had no power to enter judgment, but only authority to quash the judgment and decision of the court of appeals.

And in *State ex rel. Detroit, etc., Ins. Co. v. Ellison*,⁴⁸ the Supreme Court, upon certiorari, quashed the decision and judgment of the Kansas City Court of Appeals where that court had affirmed a judgment for the plaintiff in an action on a fire insurance policy.⁴⁹ The Supreme Court held that the court of appeals failed to follow previous controlling decisions of the Supreme Court in approving two instructions given by the trial court defining the burden of proof as to the defense of willful burning by the insured. No question of certiorari was decided. All concurred, except BOND, J., who dissented.

And in *State ex rel. Scullin v. Robertson*,⁵⁰ the writ issued to the Springfield Court of Appeals was quashed upon final hearing in an opinion by BLAIR, J., in which all concurred but BOND, J., who concurred in the result only. The question arose in this way: the plaintiff in the circuit court recovered a judgment against a railroad company for injury received at a public crossing. His petition was in three counts; the first alleged failure to give crossing signals of the train's approach, the second was based upon the humanitarian rule, while the third alleged a failure to provide a proper public crossing. All counts were submitted to the jury who returned a verdict for plaintiff on the first count and made no express finding as to the

48. (1916) 187 S. W. 23.

49. *Rice v. Detroit Fire & Marine Ins. Co.* (1915) 176 S. W. 1113.

50. (1916) 187 S. W. 34.

second and third counts. The court of appeals held the evidence showed as to the first count that the plaintiff should not recover as he was, as a matter of law, guilty of contributory negligence.

The court of appeals then reversed the judgment on the first count and remanded the case to the circuit court for retrial. In remanding the case the court said that defendant had induced the trial court to give an erroneous instruction upon the humanitarian rule. Relator upon certiorari contended that the court of appeals should have reversed the judgment and not reversed and remanded the case and that the latter course was the only proper course under repeated rulings of the Supreme Court. It was contended that, according to previous decisions of the Supreme Court, the verdict on the first count was a final bar to further action on the other counts, which were submitted to the jury, upon which no verdict was returned, and that the court of appeals should not have considered whether the instruction was prejudicial to plaintiff as plaintiff had not appealed. The Supreme Court held, first, that the verdict on the first count, according to its previous decisions, was not a bar to further action on the second and third counts and, second, that if the court of appeals concluded that there was evidence as to either count which indicated that a case might be made upon either count on a retrial, it had the power to remand the case to the circuit court for another trial tho the plaintiff, who did not appeal, could not complain of the erroneous instruction as to the second count. Judge BLAIR, for the court, said that a presumption exists that the court of appeals came to the correct conclusion as to whether the record before it showed that the evidence on the second and third counts indicated that the plaintiff might on a retrial adduce sufficient proof to go to the jury. He said the Supreme Court had before it only the facts the court of appeals stated in its opinion as to the first count, but that even if that was all the evidence in the case the court of appeals might have concluded from the whole record that the plaintiff on a retrial would probably be able to adduce additional proof sufficient to entitle

him to go to the jury on the second or third count, and that the settled practice in the Supreme Court is to remand the case for retrial under such circumstances.

This decision seems sound and not contrary to the power of the Supreme Court to examine the record in a court of appeals, if necessary, to determine whether the rule of law as previously announced by the Supreme Court has been applied; tho the written opinion of the court of appeals seems to be not as specific as it might have been on the question whether they remanded the case solely because of the erroneous humanitarian instruction or because they concluded from the whole record evidence might be adduced on a retrial sufficient to take the case to the jury. There is of course a presumption that a court of appeals correctly states and interprets facts and nothing was shown to the Supreme Court, it seems, to the contrary. As to this Judge BLAIR said that, "the fact that the whole evidence is not before *us* does not affect the matter save that it justifies us in presuming the record before the Court of Appeals justified whatever action it took in so far as evidence, rulings on instructions, etc., could justify it."

These are all the cases that have been found reported in the official reports and the Southwestern Reporter up to this time.⁵¹ They have been stated in detail in order that the reader may be better able to draw his own conclusions as this branch of the law is new and somewhat unsettled; however, frequent comments have been made in connection with the statement of the cases and in conclusion the following summary of the law has been attempted:

First, it is now finally settled that under the constitution, by writ of certiorari issued to a court of appeals from the Supreme Court, the Supreme Court has the power to quash a decision and judgment of a court of appeals which fails to follow previous controlling decisions of the Supreme Court.

Second, a previous controlling decision of the Supreme Court exists where the rule of law has been announced by that court, tho the facts to which the rule was applied by the Supreme

51. August 23rd, 1916. -

Court may be different from the facts in the case before the court of appeals for decision.

Third, where there is no previous decision of the Supreme Court as to a particular rule of law, courts of appeals, in cases of which they have appellate jurisdiction, have the power to apply the rule of law they conclude is the sound rule and the Supreme Court will not by certiorari decide whether the rule applied is the sound rule.

Fourth, if a court of appeals has failed to follow the last previous ruling of the Supreme Court and the Supreme Court is of the opinion that the last previous ruling not followed is wrong and that the court of appeals has applied the sound rule a Supreme Court may and should decline to quash the judgment and decision of the court of appeals.

Fifth, judgment in the case reviewed upon certiorari will not be rendered by the Supreme Court as the purpose of the writ is to correct excess of jurisdiction; but the decision of the court of appeals may be quashed, if contrary to a previous controlling decision of the Supreme Court, as it is void; or the writ of certiorari will be quashed, if the decision of the court of appeals is not in conflict with a previous decision of the Supreme Court.

Sixth, tho the state of the law is somewhat uncertain, the Supreme Court upon certiorari, in determining whether the rule of its previous decision has been followed, should examine not only the written opinion of a court of appeals but should examine the record upon which the court of appeals decided the case, if necessary, to determine whether the court of appeals in the very case decided applied the rule of law previously announced by the Supreme Court.

Seventh, unless the Supreme Court has authority to examine the record upon which the court of appeals acted actual harmony of the law may not be attained; under the constitution the power given the Supreme Court was not merely power to enforce harmony of the written opinions of the courts but power to force courts of appeals in deciding cases to actually apply the rule of law previously announced by the Supreme Court.

Eighth, the writ of certiorari, as known to the common law, is an adequate remedy to bring up for inspection the record upon which the court of appeals acted, and to enforce actual harmony of decision; and its common law functions have not been in any way restricted by the constitution so as to leave the Supreme Court without an adequate remedy to enforce actual harmony of decision.

Ninth, there are no procedural difficulties as to bringing up the record of a court of appeals to the Supreme Court, as the statutes provide for a printed abstract of the record to be filed in the court of appeals, which also may be used by the Supreme Court, in determining upon what facts the action of the court of appeals is based.

J. P. McBAINE

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NOTES ON RECENT MISSOURI CASES

CORPORATIONS—PRELIMINARY STOCK SUBSCRIPTION AGREEMENTS.

*State ex rel. Thompson v. Reynolds.*¹—The Supreme Court issued a writ of certiorari to the St. Louis Court of Appeals on the relator's contention that the latter court in *De Giverville Land Co. v. Thompson*² had failed to follow the last controlling decision of the Supreme Court, viz., *Sedalia, Warsaw & Southern Railway Co. v. Wilkerson.*³ The latter case was decided with reference to a preliminary stock subscription agreement under the statute as to railway companies,⁴ and it was held that the estate of a subscriber who had agreed to take shares but who died before the incorporation was completed was not liable. *De Giverville Land Co. v. Thompson* was decided under the statute as to manufacturing and business companies of 1909,⁵ the terms of which are quite different from those of the statute under which *Sedalia, Warsaw & Southern Railway Co. v. Wilkerson* was decided; and on facts quite different from those which the Supreme Court had considered, it was held that the subscriber was bound and that the decision in the Supreme Court was not controlling. The sole question before the Supreme Court was whether the Court of Appeals had failed to follow its last controlling decision as the constitution requires, for it had previously been held that on certiorari to a court

1. (1916) 186 S. W. 1057.

2. (1915) 190 Mo. App. 682, 176 S. W. 409.

3. (1884) 83 Mo. 235.

4. Wagner's Statutes 1870, p. 299, and Laws of 1877, p. 371.

5. Revised Statutes 1909, § 3339 *et seq.*

of appeals the Supreme Court will not go into the correctness of its previous decision to reopen a discussion of the whole subject on its merits;⁶ any other rule would convert the writ of certiorari into a writ of error. But the Supreme Court speaking thru BLAIR, J., made no effort to determine whether the case in the St. Louis Court of Appeals was distinguishable from *Sedalla, Warsaw & Southern Railway Co. v. Wilkerson*, but proceeded to determine what the rule should be as to preliminary stock subscription agreements and concluded that "the decision in the Wilkerson Case, in so far as it conflicts with this holding, should be overruled." The court then announced that in view of this conclusion "the grounds upon which" the court of appeals had "distinguished the Wilkerson Case, cannot be considered as authoritative," and it proceeded to quash the writ of certiorari.

This opinion is indeed surprising. It is certainly a departure that in certiorari directed to a court of appeals to determine whether the last controlling decision of the Supreme Court has been followed, the Supreme Court should deliberately refuse to say whether its decision was controlling and proceed to consider the case on its merits as tho there had been no previous decision. The profession will doubtless feel that this is an undesirable departure, for it would leave little difference between review by certiorari and on writ of error and thus further restrict the final jurisdiction of the courts of appeals. But it was wholly unnecessary in this case to take any such position, for there is a very clear difference between the statute under which *Sedalla, Warsaw & Southern Railway Co. v. Wilkerson* was decided, and the statute which the court of appeals was applying in *De Giverville Land Co. v. Thompson*, as the writer has shown in a previous number of the Law Series.⁷ This difference amply justifies the court's quashing its writ.

But it is even more objectionable that the court should on such apparently scant consideration announce a willingness to overrule a decision which has been accepted by the bar for more than thirty years, and which has been followed by the court of appeals against its will.⁸ It may be too much to expect of a busy court a thoro analysis of preliminary subscription agreements, but the subject has been extensively studied⁹ and it is disappointing that a change in the law should be intimated without any reference to available aids. Tho the writer believes that the decision in *Sedalla, Warsaw & Southern Railway Co. v. Wilkerson* should be overruled, it is a subject of intrinsic

6. In *State ex rel. Zehnder v. Robertson* (1914) 262 Mo., 613, 172 S. W. 6, the court said: "In certiorari of the kind and character involved here, we are not really concerned as to what the true rule shall be, but are only concerned in what the rule is in Missouri, as established by this court prior to the time the court of appeals acted." But see Professor McBaine's article on "Certiorari from the Missouri Supreme Court to a Court of Appeals." *infra*, p. 68.

7. 9 Law Series, Missouri Bulletin, pp. 26, 33.

8. In *Shelby County Railway Co. v. Crow* (1909) 137 Mo. App. 461.

9. See the article on "Preliminary Stock Subscription Agreements in Missouri" in 9 Law Series, Missouri Bulletin, pp. 3-37, and citations therein.

difficulty and the rule quoted from Ruling Case Law is grossly inadequate. Furthermore, since the court was purporting to decide the original case on its merits, it should have analyzed the statute as to manufacturing and business companies and the effect of the failure to include the defendant subscriber among the original incorporators.

The case has not the effect of overruling the Supreme Court's previous decision in spite of the gratuitous expression in the opinion, however, for it is submitted that such a result could not be achieved on certiorari to a court of appeals. Tho its authority is very much weakened, *Sedalla, Warsaw & Southern Railway Co. v. Wilkerson* must still represent the law and numerous questions on the effect of the various statutes on preliminary subscriptions are still open, as the writer has shown in a previous number of the Law Series.

MANLEY O. HUDSON

WILLS—GIFT CUT DOWN BY LATER WORDS. *Howard v. Howard*.¹—

A testator devised one fourth of his property to each of his four children and provided that three of the children should act as guardians of the fourth, Augustus, "giving to him every twelve months the interest or proceeds." This was "done to keep Augustus from spending or squandering" his fourth, and it was provided that "should Augustus die then will is that his share of my estate be divided amongst his heirs." In an action of partition, brought to obtain a judicial construction of the will, the Supreme Court held that Augustus took his fourth in fee, unaffected by an testamentary trust, and purported to apply the rule that a devise in unequivocal terms will not be cut down by later words in a will less unequivocal.

This seems to be a clear misapplication of the principle which the court purported to apply. No reason is perceived why the intent of the testator should not have been effectuated and a testamentary trust created. To be sure, the *cestui que trust* might at any time have compelled the trustees to convey the legal title to him since no one else was beneficially interested, inasmuch as the provision for Augustus' death clearly referred to his death during the testator's lifetime. The court had no doubt that this was the meaning of the words in the will, but it seems to have regarded the words creating the trust as somehow cutting down the absolute interest previously given. The principle invoked had not previously been applied where the later words merely denominated the nature of the devisee's title, making it equitable instead of legal; and it is submitted that there is no good reason for so extending its application. The result in this case was not serious, but it deserves to be pointed out that the case involves an undesirable extension of this artificial rule for the construction of wills.

MANLEY O. HUDSON

1. (1916) 184 S. W. 993.

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THE TRANSFER AND PARTITION OF REMAINDERS IN MISSOURI

By MANLEY O. HUDSON
Professor of Law

NOTES ON RECENT MISSOURI CASES



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Number Fourteen

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This number of the Law Series should be cited as 14 *Law Series, Missouri Bulletin*. Subjects of articles in previous numbers will be found listed in the back of this number.

The Transfer and Partition of Remainders in Missouri*

INTRODUCTORY

The common law gave to vested remainders many of the qualities of present estates, and most of the questions arising in connection with their transfer have long been free from difficulty. But contingent remainders occupied such a precarious place in the law long after they were first recognized as legal interests,¹ that all questions as to their transferability were approached with exceeding reluctance. The contingent remainderman had only a mere possibility of an estate, and the employment of such a description was in itself sufficient to conjure difficulty, for *possibility* to the common law lawyer was a dangerous word. A dealing in possibilities smacked of maintenance and its consequent taint. It is not surprising, therefore, that when all conveyances of interests in land were formal and restricted and when uncertain future interests were not favored, artificial rules for the alienation of contingent remainders took root; and although conveyances have been freed from most of the feudal restrictions and uncertain interests have come into greater favor, the force of the artificial rules has not entirely spent itself. A special treatment of the transfer of remainders seems to be justified, therefore, with especial reference to a few recent Missouri decisions.²

*The substance of this article appeared in 26 Yale Law Journal 24, in November, 1916, and is republished with the permission of the editor of that magazine. The discussion of *Shelton v. Bragg* (1916) 189 S. W. 1174 is entirely new, the case having been decided since the original article appeared.

1. The recognition of contingent remainders was probably prior to 1430. Gray, *Perpetuities* (3d ed.) § 134. But it is possible that contingent remainders to uncertain persons were not allowed until later. See 14 Law Quart. Rev. 234, 238.

2. Particularly, *Hauser v. Murray* (1914) 256 Mo. 58, 165 S. W. 376; *Eckle v. Ryland* (1914) 256 Mo. 424, 165 S. W. 1035; *Tevls v.*

In dealing with contingent remainders it is necessary to keep constantly in mind the nature of the contingency, and it will be convenient to distinguish two classes of contingencies: (1) those which affect the determination of the person who may come into the enjoyment of the estate, and (2) those which affect the completeness of the title accruing to an ascertained person in whose favor the limitation was made. Typifying the first class, a devise to A for life, remainder in fee to the heirs of X, a living person—no definite person can be said to have the contingent remainder because of the possibility that so many various persons may come to be clothed with the right; typifying the second class, a devise to A for life, remainder in fee to B if he survive X—the remainder is in B, although it is an incomplete interest pending the contingency. If a remainder is conferred on B, who may be heir apparent of X, on the contingency that he survive X as heir, we have a case clearly of the second class, although it closely resembles the typical case of the first class. This distinction was made by Fearné throughout his treatise,³ and it is important that it be observed in this study for historical reasons at least. The distinction is sometimes expressed by referring to B in cases of the second class as having “a vested interest in a contingent remainder,”⁴ but because of its tendency toward confusion that expression should be avoided.

The various methods of transfer will be treated under the titles of intestate succession, testamentary disposition and *inter vivos* alienation. Partition is really a method of transfer but will be treated separately.

Tevis (1914) 259 Mo. 19, 167 S. W. 1003; and *Stockwell v. Stockwell* (1914) 262 Mo. 671, 172 S. W. 23; *Shelton v. Bragg* (1916) 189 S. W. 1174.

3. Fearné, *Contingent Remainders*, p. 370. From Fearné, it was adopted in *Shaw Fletcher, Contingent and Executory Interests*, p. 172. Fearné's fourth class of contingent remainders was “to a person not ascertained or not in being.” See 2 Preston, *Abstracts*, p. 95.

4. See *Putnam v. Story* (1882) 132 Mass. 205; 2 Washburn, *Real Property* (6th ed.) § 1557; *Love v. Linstedt* (Or., 1915) 147 Pac. 935. In *Rozier v. Graham* (1898) 146 Mo. 352, 48 S. W. 470, the court used the expression, “Tho a fee may vest as a contingent remainder.” The distinction is sometimes expressed by a reference to the contingent remainder's vesting “in interest” while yet contingent. See *Cummings v. Stearns* (1894) 151 Mass. 560; *Huntress v. Allen* (1907) 195 Mass. 226.

TRANSFER BY INTESTATE SUCCESSION

A vested remainder was descendible at common law⁵ and will of course pass to the heirs of the remainderman under the modern statute of descents.⁶ In *Jones v. Waters*,⁷ a vested remainder was sold by an administrator under order of the county court. In *Wommack v. Whitmore*,⁸ land was conveyed to X in trust for A for life, remainder to her children; B, a daughter of A, predeceased A, leaving a daughter, C, who was her heir and C predeceased A, leaving her father (B's husband) as her heir: it was held that C's father took the remainder given to B, by descent from C upon whom it had descended from B. This case is of interest because of the rule of the common law as stated by Fearn⁹ that one "who claims a fee simple by descent from one who was first purchaser of the reversion or remainder expectant on a freehold estate, must make himself heir to such purchaser, at the time when that reversion or remainder falls into possession." While the Missouri court

5. Watkins, Descents, p. 4.

6. Revised Statutes 1909, § 332, "when any person having title to any real estate of inheritance." *Reinders v. Koppelman* (1878) 68 Mo. 482; *Waddell v. Waddell* (1889) 99 Mo. 338, 12 S. W. 349; *Oheo v. Keller* (1889) 100 Mo. 362, 13 S. W. 395. A reversion is a descendible interest under this statute. *Payne v. Payne* (1893) 119 Mo. 174, 24 S. W. 781.

7. (1853) 17 Mo. 587. The "county court" was probably the probate court.

8. (1874) 58 Mo. 448. Nothing turns on the fact that the remainder was equitable.

9. Fearn, Contingent Remainders, p. 561. See *Goodright v. Searle* (1756) 2 Wils. 29, upon which Fearn's statement is based, and *Doe d. Andrew v. Hutton* (1804) 3 B. & P. 643, where it is cited with approval. See also Shaw Fletcher, Contingent and Executory Interests, p. 174. *Goodright v. Searle* was followed by Story, J., in *Barnitz's Lessee v. Casey* (1813) 7 Cranch 456. For comment on this case, see Bingham, Descents, p. 223. See also *Buck v. Lontz* (1878) 49 Md. 439; *Garrison v. Hill* (1894) 79 Md. 75; *Jenkins v. Bonsall* (1911) 116 Md. 629, where the rule was applied to a remainder in personality; *Lawrence v. Pitt* (1854) 46 N. C. 344; *Payne v. Rosser* (1875) 53 Ga. 662. But outside of Maryland the tendency of modern decisions is away from the rule of the common law as stated by Fearn, and where possible it will be found that the statute of descents has abrogated the rule. See *Early v. Early* (1904) 134 N. C. 258; *Oliver v. Powell* (1901) 114 Ga. 592; *North v. Graham* (1908) 235 Ill. 178. See also 3 Illinois Law Rev. 185. For the rule in England since the Wills Act of 1837, see *Ingilby v. Amcotts* (1856) 21 Beav. 585.

clearly did not have Fearn's statement in mind, the result of the decision is probably not consistent with an application of the rule, for B's husband was probably not heir to B at the time of A's death. The court seems to have been of the opinion that it was unnecessary for one claiming a remainder by descent to make himself heir to the first taker of the remainder as of the time of its vesting in possession, and this seems far more satisfactory than the artificial rule of descent which would have the effect of converting a vested remainder into a contingent remainder in the hands of the first remainderman's heir.¹⁰ The terms of the Missouri statute of descents offer sufficient justification for repudiating the old rule, for the statutory descent is from one "having title."

A contingent remainder was descendible at common law whenever the person was certain, *i. e.*, where the contingency did not involve a determination of the person who was to take. Thus, a devise to A for life, remainder to B and his heirs if C survive A; B clearly has a descendible interest during the lifetime of C and A, although it will of course be defeated by C's failure to survive A. But the nature of the contingency may involve a survival of the remainderman beyond a certain time, and it is equally clear that such a remainderman has no descendible interest prior to such survival, even though he be an ascertained person: for example, a devise to A for life, remainder to B and his heirs if B survive A—obviously B has no interest which can descend to his heirs prior to his survival of A, *i. e.*, prior to its becoming an estate in possession, for B's death during A's lifetime will entirely preclude the vesting of the remainder. Such a contingent remainder is not descendible because of the nature

10. In *Shaw Fletcher, Contingent and Executory Interests*, p. 174, it is said that a remainder "to B and his heirs" must pass to one who is heir to B at the time of its vesting in possession because of the limitation itself; but this seems to neglect the principle that the words "and his heirs" are words of limitation of B's estate only. Cf. *Golladay v. Knock* (1908) 235 Mo. 412, 413. A more plausible statement of the rule is to be found in *Watkins, Descents*, p. 118. The rule had its origin in the common law rule that descent should be traced from the person last actually seised, or from the first purchaser. See *Early v. Early* (1904) 134 N. C. 258, 265. The common law maxim *seisina facit stipitem* was expressly repudiated by LEWIS, P. J., in *McKee v. Cottle* (1879) 6 Mo. App. 416, 419.

of the contingency.¹¹ If land is devised to A for life, remainder to the unborn son of B (a single person), it is unnecessary to deal with any question of descendibility of the remainder prior to its becoming vested. If the devise is to A for life, remainder to the heirs of X, clearly, also, no question can arise as to the descendibility of the remainder while it is contingent, for the death of a possible remainderman during the life of X would preclude his being an heir and thus destroy the possibility of his becoming the remainderman.

But more difficulty is encountered when the remainder is conferred on an unascertained person or persons, and where the death of a certain person or persons is not determinative of his or their being the person or persons who may later be ascertained to be the object or objects of the limitation. Thus, a devise to A for life, remainder in fee to the youngest child of X born prior to A's death; X has two children B and C; has C, the younger of them, a contingent remainder? So long as X lives, he may have other children. C seems to have a contingency of a vested remainder rather than a remainder on a contingency.¹² This distinction is slight, if not fanciful,¹³ but it has been seized upon and made the basis for a supposed rule that a remainder to an unascertained person is not descendible.¹⁴ This rule has been recognized

11. This exception is clearly stated in *Fearne, Contingent Remainders*, p. 364. See also *Hennessey v. Patterson* (1881) 85 N. Y. 91; *Brown v. Williams* (1858) 5 R. I. 308.

12. It may be likened to an expectancy of succession to an ancestor's property as his heir, during the ancestor's lifetime. It would seem therefore to fall within Challis' classification of "absolutely bare possibilities" as opposed to "possibilities coupled with an interest," which latter phrase includes the ordinary contingent remainders. See Challis, *Real Property* (3d ed.) p. 76, note. See also 1 Preston, *Estates*, p. 76; 2 Preston, *Abstracts*, pp. 95, 204.

13. See *Parkhurst v. Smith* (1741) Willes 327, 338; *Doe d. Calkin v. Tomkinson* (1813) 2 M. & S., 165; Challis, *Real Property* (3d ed. p. 234. In *Doe d. Calkin v. Tomkinson*, Lord Ellenborough asked, "How can a person be said to have a contingent interest, when it is uncertain whether he is the person who will be entitled to have it or not." In 1 Preston, *Estates*, p. 76, the distinction is made the basis for a division between possibilities coupled with an interest and those not coupled with an interest. See also 2 Preston, *Abstracts*, pp. 95, 204.

14. Watkins, *Descents*, p. 4; *Fearne, Contingent Remainders*, p. 370; *Doe d. Calkin v. Tomkinson* (1813) 2 M. & S. 165. Cf. *Roe d. Noden v. Griffith* (1767) 1 W. Bl., 605; Leake, *Property in Land* (2d ed.) p. 241 n.; 2 Preston, *Abstracts*, p. 95.

by many American writers,¹⁵ but Professor Kales, whose opinion is entitled to great weight, seems to recognize no such exception to the general rule that contingent remainders are descendible unless the death of the remainderman precludes the later vesting of the remainder.¹⁶ Invariably, when the supposed rule is stated, it is connected with a discussion of cases in which the death of the remainderman would preclude a latter vesting. It is doubtful whether the rule has been applied in any case where the contingency did not have to do with the remainderman's surviving the particular tenant. In the case supposed, if X should die without having had other children, C's death before X ought not to result in a defeat of the gift to X's youngest child. Yet this would be the effect of applying the supposed rule that a remainder to an unascertained person is not descendible. It is submitted that the authorities do not clearly establish such a rule and that its application at the present time would mean an unfortunate revival of the feudal refinements as to possibilities.

The Missouri cases on the subject are disappointing because of their failure to notice the distinctions above made. In *Delassus*

15. 2 Washburn, Real Property (6th ed.) § 1557; 4 Kent, Commentaries (14th ed.) p. 261; Tiffany, Real Property, § 129. In *Brown v. Williams* (1858) 5 R. I. 309, Ames, C. J., approved the distinction by saying that "If the contingency is to decide who is to be the object of the contingent limitation, as the person, or of the persons, to or amongst whom the contingent or future interest is directed, as it cannot be determined in whom the interest is, until the contingency happens, no one can claim before the contingency decides the matter, that any interest is vested in him to descend from, and hence to be transferred or devised by him." see also *Pelletreau v. Jackson* (1833) 11 Wendell 110; *Roundtree v. Roundtree* (1887) 26 S. C. 450; *Mohn v. Mohn* (1910) 148 Ia. 288; *Fisher v. Wagner* (1909) 109 Md. 443. The Georgia statute provides for the descent of a contingent remainder "when the contingency is not as to the person but as to the event." Park's Code, § 3677. See *Morse v. Proper* (1888) 82 Ga. 13.

16. Kales, Future Interests in Illinois, § 72, n. 27. In *Re Cresswell* (1883) 24 Ch. D. 102, Kay, J., said, "As far as I can discover, the only case in which a contingent future interest is not transmissible is where the being in existence when the contingency happens is an essential part of the description of the person who is to take." This is quoted in 2 Jarman, Wills (6th ed.) 1353. The supposed necessity that the remainderman be ascertained finds no countenance from Jarman. The strongest authority for the supposed rule is to be found in Preston's works. 2 Preston, Abstracts, pp. 95, 205; 1 Preston, Estates, p. 76. In *Chess' Appeal* (1878) 87 Pa. St. 362, it is said that a contingent remainder is transmissible unless the contingency relates to the capacity of the remainderman to take. Cf., *Clarke v. Fay* (1910) 205 Mass. 228.

v. Gatewood,¹⁷ there was a devise to the testator's widow for life and at her death to the testator's "children that are alive, or their bodily children." One son of the testator predeceased his mother leaving a widow and one son, and the latter died before the termination of the life estate. The court held that the remainder was contingent in the testator's children, but it would seem to have become vested in the "bodily children" of any child dying during the lifetime of the testator's widow. On this latter point, the court was by no means clear; it seems to have treated the remainder of the "bodily children" as contingent on their surviving the testator's widow, for it held that the widow of the testator's son took nothing by descent from her child upon the latter's death during the lifetime of the testator's widow. If the remainder of the "bodily children" was contingent, the grandson's death during the continuance of the life estate precluded a later vesting. In any event, therefore, the case stands for nothing as to the descendibility of a contingent remainder, although the court seems to have thought it was applying a rule that contingent remainders are not descendible.¹⁸

The statement was made *obiter* in *Payne v. Payne*¹⁹ that "a remainder can only be acquired by purchase, and never by descent;" but this should be taken to refer to the creation of remainders, rather than to their devolution after creation. In *Sullivan v. Goresche*,²⁰ the remainder was given to "surviving children" and it was held that this meant surviving at the time of the termination of the particular estate, so that the death of a possible remainderman theretofore necessarily precluded the vesting of the interest and there was nothing to descend. In *Hauser*

17. (1880) 71 Mo. 371. The situation in *Ruddell v. Wren* (1904) 208 Ill. 508 was very similar, though the remainder was more clearly contingent. Whether the contingency was such as to preclude the descent of the remainder, *quaere*. The court's opinion clearly made it so.

18. The court cited Bingham, *Descents*, pp. 222, 223, where the opinion is expressed that contingent remainders are not descendible, and the authorities are reviewed very speciously, there being no citation of Fearn. In view of the comment here made on *Delassus v. Gatewood*, it is submitted that the case was improperly cited in Washburn, *Real Property* (6th ed.) § 1557 note. Cf. *Rindquist v. Young* (1892) 112 Mo. 25, 20 S. W. 159.

19. (1893) 119 Mo. 174, 24 S. W. 781.

20. (1910) 229 Mo. 496, 129 S. W. 949.

v. *Murray*,²¹ the flat statement was made that "contingent remainders are not descendible," but again the court was considering a remainder to the "bodily heirs" of a life tenant and the person from whom descent was claimed failed to become an heir by his non-survival.

These descisions leave the question of descendibility unsettled in Missouri. But it is submitted that the way is still open to the Missouri court to declare that whenever the person to take is ascertained a contingent remainder is descendible unless the survival of the deceased is itself a part of the contingency. The law in other states is settled this far.²² It would undoubtedly be simpler if it were unnecessary to add, "whenever the person to take is ascertained," and it is submitted that this would involve no departure from the common law as it has actually been applied by the courts in England and America. If a contingent remainder is held to descend, it may do so, however, subject to the rule of *Goodright v. Searle* noted above.²³

Since there is no seisin of a contingent remainder, there can be no dower or curtesy in it, and even the owner of a vested remainder does not have seisin so as to entitle his wife to dower.²⁴

21. (1913) 256 Mo. 58, 97, 165 S. W. 376. The court cites for the statement quoted *Delassus v. Gatewood*, already discussed, and *Dickerson v. Dickerson* (1907) 211 Mo. 483, 110 S. W. 1100; in the latter case no question of descendibility was involved. In *Romjue v. Randolph* (1912) 166 Mo. App. 87, 148 S. W. 185, ELLISON, J., seems to have admitted that a contingent remainder is descendible.

The same confusion seems to exist in the Illinois decisions. See *Kales, Future Interests in Illinois*, § 73.

22. See *Winslow v. Goodwin* (1884) 7 Metcalf (Mass.) 363; *Clark v. Cox* (1894) 115 N. C. 93; *Tiffany, Real Property*, § 129; *Kales, Future Interests in Illinois*, § 72.

23. *Ante*, note 9. See *Barnitz v. Casey* (1813) 7 Cranch 456. Cf. *Fisher v. Wagner* (1909) 109 Md. 243, 251. The Missouri statute provides a course of descent "where any person having title to any real estate of inheritance" dies. *Ante*, note 5. A contingent remainderman would seem to be such a person, in view of the interpretation of a similar expression in the statute on conveyances made in *Godman v. Simmons* (1892) 113 Mo. 122, 20 S. W. 972.

24. *Scribner, Dower* (2d ed.) p. 321; *Fearne, Contingent Remainders*, p. 346; *Warren v. Williams* (1887) 25 Mo. App. 22; *Cochran v. Thomas* (1895) 131 Mo. 258, 33 S. W. 6; *Martin v. Trail* (1897) 142 Mo. 85, 43 S. W. 655; *Cox v. Boyce* (1899) 152 Mo. 576, 54 S. W. 467; *Von Arb v. Thomas* (1901) 163 Mo. 33, 63 S. W. 94; *Majors v. Cryts* (1911) 240 Mo. 386, 144 S. W. 769. In *Payne v. Payne* (1893) 119 Mo. 174, 24 S. W. 781, it was held that the widow of a reversioner had no dower in the reversion. But cf., *McKee v. Cottle* (1879) 6 Mo. App. 416.

TRANSFER BY TESTAMENTARY DISPOSITION

It would seem that if a remainder is descendible it should also be devisable,²⁵ but devisability depends upon statute and is to some extent a question of statutory construction. The early English Statute of Wills gave a limited power of testamentary disposition to persons "*having* or which hereafter *shall have* any manors, lands, tenements or hereditaments, holden," etc.²⁶ This was for many years construed not to include contingent remainders, the word "*having*" being read to mean "*seized of*;"²⁷ but the contrary has now long been held in England and the statute is held to mean "*that every person who has a valuable interest in lands shall have the power of disposing of it by will.*"²⁸ The more modern Wills Act²⁹ is quite explicit in permitting the devise of any interest which would descend and of any contingent interest "*whether the testator may or may not be ascertained as the person or one of the persons in whom the same may respectively become vested.*" This would seem to authorize the devise of a contingent remainder which might not be descendible because of the non-ascertainment of the person in whom it may vest, but English opinion does not seem clear on the point.³⁰

Of course a contingent remainder cannot be devised by one whose death precludes the later vesting of the interest,³¹ and it seems that the same objection may be made to the devise of a

25. See *Roe d. Noden v. Griffith* (1767) 1 W. Blackstone 605; *Inglby v. Amcotts* (1856) 21 Beav. 585. Descendibility is not an accurate test of devisability. Rights of entry for condition broken are descendible but probably not devisable. See 5 Law Series, Missouri Bulletin, p. 15; 9 Columbia Law Review, 548.

26. (1540) 32 Henry VIII, c. 1. As amended in 34 and 35 Henry VIII, c. 5, § 4, this statute expressly included remainders.

27. *Bishop v. Fountaine* (1696) 3 Lev. 427; *Ives v. Legge* (1743) 3 D. & E. 488. These cases are discussed in Fearne, Contingent Remainders, p. 366; Shaw Fletcher, Contingent and Executory Interests, p. 180.

28. *Jones v. Roe* (1789) 3 D. & E. 88; Fearne, Contingent Remainders, pp. 366 *et seq.*

29. (1837) 1 Vict. c. 26.

30. A contrary view is expressed in Shaw Fletcher, Contingent and Executory Interests, p. 181. But see 1 Jarman, Wills (6th ed.) p. 80. Fearne may have considered such a remainder as devisable in equity independently of statute. Fearne, Contingent Remainders, p. 548.

31. *Brown v. Williams* (1858) 5 R. I. 309.

remainder, where the person to take is not ascertained, as was made to its descendibility above.³² But subject to these exceptions, it is now generally held that vested and contingent remainders are freely devisable,³³ and in some states this is confirmed by statute.³⁴

The Missouri statute permits a man to devise "all his estate, real, personal and mixed and all interest therein," and a woman to devise "her land, tenements or any descendible interests therein."³⁵ The decisions have not closely analysed the effect of this statute. There can be no doubt as to the devisability of a vested remainder,³⁶ but there is much to lead the unwary to conclude that contingent remainders cannot be devised. Under the terms of the statute there may be a difference whether the devise is by a man or a woman, and only descendible remainders may be devisable by a woman, thus opening up the uncertainty as to what is descendible. However, it seems unlikely that the court would favor such a distinction.

In *Eckle v. Ryland*,³⁷ the court recognized the practical impossibility of devising a contingent remainder where "the same event which makes the will effective makes it impossible for the con-

32. But Professor Kales disapproves of any such reason for non-devisability. See his *Future Interests in Illinois*, § 73 n. Cf. 2 Preston, *Abstracts*, p. 95. In 1 Preston, *Estates*, p. 76, it is said that a remainder to an unascertained person is a possibility not coupled with an interest and is not devisable. In *Fisher v. Wagner* (1909) 109 Md. 243, 21 L. R. A. 121, the court emphasized the fact that the contingency did not affect the ascertainment of the person.

33. *Loring v. Arnold* (1887) 15 R. I. 428; *Chess' Appeal* (1878) 87 Pa. St. 362; *Kenyon v. See* (1884) 94 N. Y. 563; *Fisher v. Wagner* (1909) 109 Md. 243. See also Tiffany, *Real Property*, § 129; 9 Columbia Law Rev. 546.

34. See Reeves, *Real Property*, § 904. In Illinois, the statute is not explicit, but contingent remainders are probably devisable. Cf. *Harvard College v. Balch* (1898) 171 Ill. 275; and the comment in Kales, *Future Interests in Illinois*, § 73. The Georgia statute making contingent remainders descendible "when the contingency is not as to the person," Parks' Code § 3677, seems to apply by analogy to devises. *Morse v. Proper* (1888) 82 Ga. 13.

35. Revised Statutes, 1909, §§ 535, 536. An early Missouri statute authorized the devise of all "estate, right, title and interest in possession, reversion or remainder." Revised Statutes, 1825, p. 790. But this wording was dropped in 1835. Revised Statutes, 1835, p. 617.

36. *Waddell v. Waddell* (1889) 99 Mo. 338, 12 S. W. 349; *Eckle v. Ryland* (1913) 256 Mo. 424, 165 S. W. 1035 (semble); Tiffany, *Real Property*, § 129.

37. (1913) 256 Mo. 424, 440, 165 S. W. 1035.

tingency to happen," *i. e.*, where the testator's death precludes the vesting of any interest. *Tewis v. Tewis*³⁸ presents more difficulty. A testator disposed of certain land during the life of his son John, and provided that on the death of John, another son, Nestor, or his heirs, should have the right to purchase the land for a fixed sum of money, and that the money or the land, depending on Nestor's election, should "vest in the heirs of the body of John, and if there shall be no heirs of his body then living, the money or the land shall pass to and vest in" the testator's heirs at law. There was nothing in the will to refer the determination of the testator's heirs to the time of John's death, and it would seem that the will had the effect of creating a contingent remainder in the heirs of John's body subject to Nestor's right of purchase (which did not effect a conversion), and that subject to the vesting of this remainder, the heirs of the testator took the reversion by descent and not by devise,³⁹ with the result that upon John's death without bodily heirs the devisee of one of the testator's heirs who predeceased John should have taken that heir's share which was vested and therefore devisable. But the court held that such a devisee took nothing, saying that the persons who were to take on John's death without heirs of his body "could not be determined until" that contingency happened. This would make it seem that the court referred the determination of the testator's heirs to the time of John's death in spite of its previous declarations to the contrary, and if this is true the result of the case is sound for the deviser never qualified as a member of the class of objects of the limitation. But in the next breath the court said that "such interest was therefore a contingent interest and not devisable prior to the death of John," referring to *Eckle v. Ryland*. If it was contingent on the death of John without

38. (1914) 259 Mo. 19, 167 S. W. 1003.

39. Where A devises land to B for life, and remainder to C if C survive B, A's heirs take the reversion by descent subject to the contingent remainder; *Plunket v. Holmes* (1658) 1 Lev. 11; Fearne, *Contingent Remainders*, p. 351; and if A's will purports to confer the remainder upon them it is so far void, for since they would take the same interest by descent, the law gives no effect to that portion of the will. Challis, *Real Property* (3d ed.) p. 239; Sanders, *Uses* (4th ed.) p. 133; Leake, *Property in Land* (2d ed.) p. 124. It is not, therefore, a case of alternate contingent remainders but a case of a descending reversion which is subject to B's contingent remainder.

heirs of his body, such a contingency should not render it non-devisable. It is impossible to know what was meant, and in view of the court's failure to give any proper consideration to the general question of the devisability of a contingent remainder, *Tevis v. Tevis* must not be taken to stand for the proposition that contingent remainders are not devisable.⁴⁰

With this scant authority, the question is by no means settled in Missouri and it is open to the court to hold that contingent remainders are devisable wherever the person to take is ascertained, unless the death of the testator is an event which precludes the vesting of the interest. For the reason stated above, it is submitted that it should not be necessary to include "wherever the person to take is ascertained."

TRANSFER BY INTER VIVOS ALIENATION

Voluntary Alienation. The common law permitted the free alienation of vested remainders by grant, but it did not allow contingent remainders to be transferred by grant.⁴¹ As early as *Lampet's Case*,⁴² it was thought that a possibility could not be assigned, for like the assignment of a chose in action it would be the "occasion of multiplying of contentions and suits of great oppression of the people," to use Lord Coke's expression.⁴³ It was not unnatural that contingent remainders should be put with

40. The various syllabi to *Tevis v. Tevis* in 259 Mo. 19 and 167 S. W. 1003 may easily mislead the casual reader. It seems altogether improbable that the court had in mind the rule of *Goodright v. Searle* noted above, though this is a possible explanation. But even that rule does not preclude a devise by an heir of a remainderman prior to the termination of the particular estate. See *Ingilby v. Amcotts* (1856) 21 Beav. 585.

41. Fearn, *Contingent Remainders*, p. 366. The common law requirement of attornment to effectuate a grant of a reversion or remainder was abolished in 1705 by the statute of Anne, 4 Anne, c. 16, §19, the substance of which was enacted in Missouri in 1845. Revised Statutes 1845, c. 32, § 11, now Revised Statutes 1909, § 7925. See 8 Law Series, Missouri Bulletin, p. 18.

42. (1612) 10 Coke, 48a.

43. It seems difficult to justify the statement in Williams, *Real Property* (17th Int. ed.) p. 424, that the reason why a contingent remainder "so long remained inalienable was simply because it had never been thought worth while to make it alienable." This reason was accepted, however, by BAKEWELL, J., in *Lackland v. Nevins* (1877) 3 Mo. App. 335, 339.

choses in action as mere possibilities at a time when they yet commanded very little respect from the lawyers. But with their greater security in the law, there came also some necessity of relaxing the rule against their alienability. It was early held that a contingent remainder could be released.⁴⁴ If A conveys to B for life, remainder to C and his heirs if D survives B, C may release to A who has the reversion subject to the contingent remainder and A will thereafter have the reversion as though the contingent remainder had never created.⁴⁵ Such a release operates by way of extinguishment. It seems doubtful, however, whether C would have been permitted to release to B and his heirs, for although most writers make no restriction on the operation of the release,⁴⁶ it seems strange that C could release to B when he could not grant to D, inasmuch as B's previous interest would not be affected by the release. It would seem proper to say that a contingent remainder may be released only where the result will be its extinguishment, *i. e.*, it may be released only to that person whose interest would be defeated or postponed by the vesting of the contingent remainder.⁴⁷ It seems doubtful, too, whether a release can be operative when made by one who is not certain to take on the contingency, *i. e.*, where the remainder is to an unascertained person.⁴⁸

A contingent remainder was susceptible of transfer by fine or common recovery operating by way of estoppel,⁴⁹ so as to bind

44. See *Lampet's Case* (1612) 10 Coke, 48a; and *Marks v. Marks* (1718) 1 Strange, 129, 132.

45. See Williams, *Real Property* (21st Int. ed.) p. 422, where it is said that "the law, whilst it tolerated conditions of reentry and contingent remainders, always gladly permitted such rights to be got rid of by release, for the sake of preserving uninjured vested estates as might happen to be subsisting."

46. 1 Preston, *Estates*, p. 89; Reeves, *Real Property*, § 904. See 16 Viner, *Abridgement*, p. 461.

47. This distinction has been expressed very clearly by Professor Kales in 2 Illinois Law Rev. 48, in comment on the *dictum* in *Ortmayer v. Elcock* (1907) 225 Ill. 342, that a contingent remainder may be released to the life tenant. The result reached in *Jeffers v. Lampson* (1859) 10 Oh. St. 101, and in *Miller v. Emans* (1859) 19 N. Y. 384, seems agreeable to it. The result in *Smith v. Pendell* (1848) 19 Conn. 107 may be explained on the ground that the remainder was vested, though the court thought it contingent.

48. See 16 Viner, *Abridgement*, 463; Shaw Fletcher, *Contingent and Executory Interests*, p. 184. Cf. *Miller v. Emans* (1859) 19 N. Y. 384.

49. Fearn, *Contingent Remainders*, pp., 365, 366. In *Doe d. Brune v. Martin* (1828) 8 B. & C. 524, Bayley, J., said that "a fine by a con-

the interest which thereafter vested. Similarly, it would seem that the American doctrine of estoppel by deed is applicable, so that if one purports to convey land by a deed which contains covenants sufficient to pass an after acquired title by estoppel, he will not thereafter be permitted to assert a title upon the happening of a contingency upon which an estate vested in him,⁵⁰ for the application of such an estoppel with such effect on a contingent remainder, it would seem to be immaterial whether the remainderman were ascertained at the time the deed was executed.⁵¹ It would seem that a bare quit-claim deed should not create such an estoppel,⁵² although where it is clearly the intention of the parties to pass a contingent interest and there is a valuable consideration, a court of equity may later enforce such a transaction as an agreement to convey, of which specific performance will be decreed after the happening of the contingency.⁵³ This, indeed, is the meaning of the frequent statement that contingent remainders may be assigned in equity. It would seem essential to equity's enforcement that the conveyance disclose an unmistakable intent to pass the future interest. If an estoppel is created, it is binding on the heir as well as on the ancestor.⁵⁴

One of the first reforms accomplished, when the English law of real property began to be overhauled, was to make contingent

tingent remainderman passes nothing, but leaves the right as it found it, it operates by estoppel only." Cf. *Doe d. Christmas v. Oliver* (1829) 10 B. & C. 181.

50. *Robertson v. Wilson* (1859) 38 N. H. 48; *Walton v. Follansbee* (1890) 131 Ill. 147. Cf., *Stewart v. Neely* (1891) 139 Pa. St. 309.

51. *Robertson v. Wilson* (1859) 38 N. H. 48; *Tiffany, Real Property*, § 129 n. *Read v. Fogg* (1872) 60 Maine 479, was such a case; the holding that there was no estoppel was based on the absence of a complete covenant of warranty. In *Dougal v. Fryer* (1831) 3 Mo. 40, it was said that "to pass an estate by estoppel the party must have had power to pass it by a direct conveyance." *Quaere*, does this apply to contingent remainders in Missouri? Cf. *Lewis v. Bogy* (1850) 13 Mo. 365, 380; *Valle v. Clemens* (1853) 18 Mo. 486; *Ford v. Unity Church Society* (1893) 120 Mo. 498, 25 S. W. 394.

52. See however, *Hannon v. Christopher* (1881) 34 N. J. Eq. 459, where a contrary view is expressed but not held.

53. *Fearne, Contingent Remainders*, p. 550; 3 *Pomeroy, Equity Jurisprudence* (3d ed.) § 1286; *Hannon v. Christopher* (1881) 34 N. J. Eq. 459. It is possible that a consideration of love and affection is sufficient for this purpose. *Fearne, Ibid.*, p. 549.

54. *Weale v. Lower* (1672) Poll. 54.

remainders alienable. The Real Property Amendment Act⁵⁵ provides that "a contingent, an executory and a future interest, and a possibility coupled with an interest . . . whether the object of the gift or limitation of such interest or possibility be or be not ascertained . . . may be disposed of by deed." It will be noted that it was thought necessary to stipulate in this statute concerning those cases in which the object or person is not ascertained. The American statutes are usually less explicit,⁵⁶ and in many states where contingent remainders are made alienable by statute a question may still arise as to the possibility of alienation where the person who is to enjoy the estate on a contingency is not ascertained.⁵⁷

The Missouri statute, first passed in 1865,⁵⁸ authorizes the conveyance of "lands or of any estate or interest therein." Prior to 1865, contingent remainders were probably alienable in Missouri only as at common law, *i. e.*, by release operating by way of extinguishment and by some method of conveyance which would create an estoppel; but it seems that the Supreme court was not called on to decide the question, and it is practically impossible that a case should now arise which would involve it. In *Lackland v. Nevins*,⁵⁹ there was a devise in 1853 to a trustee

55. (1845) 8 & 9 Vict., c. 106. See Challis, *Real Property* (3d. ed.) p. 177.

56. For instance, the New York statute which has been copied in several states merely provides that "an expectant estate is descendible, devisable, and alienable, in the same manner as an estate in possession." N. Y. Real Property Laws, § 49. See Reeves, *Real Property*, § 904 note. For statutes of other states see Stimson, *American Statute Law*, § 1420.

57. This question seems to have been recognized by the court in *Putnam v. Story* (1882) 132 Mass. 205, although it was held that a presumptive heir could alien his interest under a will which conferred a remainder on "heirs." See also *Whipple v. Fairchild* (1885) 139 Mass. 262. In Massachusetts, contingent remainders seem to be alienable without reference to statute. See Tiffany, *Real Property*, § 129. In *Golladay v. Knock* 235 Ill. 412, 423, there was a devise to A for life with a contingent remainder to B and his heirs. B died during A's life time, and one of his heirs conveyed his interest in the remainder and later predeceased A. It was held that the conveyance was ineffective *sed quære*.

58. Revised Statutes 1865, c. 109, § 1. Now Revised Statutes 1909, § 2787. There can be no doubt of the free alienability of vested remainders under this statute. *Byrne v. France* (1895) 131 Mo. 639, 33 S. W. 178. On the general subject of methods of conveyance in Missouri, see 8 Law Series, Missouri Bulletin, p. 11, *et seq.*

59. (1877) 3 Mo. App. 335. The will in this case was construed in *Hall v. Howdeshell* (1863) 33 Mo. 475.

for A for life, and if her husband survive her, remainder to her brother and sisters.⁶⁰ In 1854, one sister conveyed all her "right, title and interest, whether in law or equity, as well in possession or in expectancy," for a valuable consideration and it was held that her contingent remainder passed, although it was not clear whether it was intended that this result be rested on the statute,⁶¹ or achieved apart from statute, or whether the court was giving specific performance to the deed, treating it as a contract to convey. The statute of 1865 was not in force when the deed was executed, and could not have applied. The court denounced the doctrine that contingent remainders are inalienable, as "contrary to the policy of our system," but it is submitted that the result of the case must be explained as a specific enforcement in equity of the agreement found in the deed. It is improbable that other cases of attempts to convey contingent remainders prior to 1865 will arise in the future, and any attempt made since 1865 can probably be rested on the statute.

*Godman v. Simmons*⁶² arose under the statute of 1865; land had been conveyed to A for life, remainder to her bodily heirs; A's children conveyed their interests, one deed purporting to pass the fee simple, one purporting to pass all interest "whether present or prospective, vested or contingent," and one deed was in the ordinary language of a quit-claim. A was survived by these children,⁶³ and it was held in this action of ejectment that their deeds were all effective to pass their contingent remainders. The court was undoubtedly applying the statute of 1865, although it professed to be acting independently of it.⁶⁴ No special attention

60. It was thought to be unnecessary to decide whether it was a contingent remainder or an executory devise to the brothers and sisters.

61. The court referred to Wagner's Statutes, p. 272, § 1. This is the same as Revised Statutes 1865, c. 109, § 1, which was not enacted until eleven years after the execution of the deed in question.

62. (1892) 113 Mo. 122, 20 S. W. 972. See also *Emmerson v. Hughes* (1892) 110 Mo. 627, 19 S. W. 979, where the same deed was construed to have created an estate tail. This was criticized in 1 Law Series, Missouri Bulletin, p. 15. In *Wood v. Kice* (1890) 103 Mo. 329, 15 S. W. 623, the possibility of mortgaging a contingent remainder seems to have been admitted.

63. It was held in *Emmerson v. Hughes* (1892) 110 Mo. 627, 19 S. W. 979, that the deed of one child who failed to survive A passed nothing.

64. BRACE, J., who wrote the opinion, said: "This ancient common law rule—that contingent remainders are inalienable, like the

was given by the court to the question whether a contingent remainder could be conveyed when the person to take is not certain, although it was raised by counsel.⁶⁵ Since the case was treated as one of an estate tail, though improperly so, this question may have been deemed less important by the court.⁶⁶ The dictum in *Sikemeier v. Galvin*⁶⁷ seems to approve the same result where no estate tail was involved. In *Brown v. Fulkerson*⁶⁸ there is a still further extension; land was devised to C and the heirs of her body with a gift over if she died without such heirs. Upon the death of C without heirs of her body, the estate would have devolved on her heirs under the statute of 1845;⁶⁹ but it was held that the deed of C's nieces and nephews who were her heirs executed before C's death, had effectively conveyed their interests. Here the relationship was remote, and the uncertainty as to the persons to take the contingent remainder was greater than in *Godman v. Simmons*, but the alienability of the remainder was none the less upheld.

In *Finley v. Babb*,⁷⁰ where the remainder was in the heirs of the life tenant, it was held that it was conveyed by a deed executed by a son before the death of the life tenant. In *Clark v. Sires*,⁷¹ and in *Parrish v. Treadway*,⁷² the remainder was in the life ten-

rule that choses in action are not assignable—does not obtain in this state; not because there has been a positive statute abolishing these rules, but because they are out of harmony with its general affirmative statute upon these subjects, and long since have ceased—if they ever did exist—as rules governing the action of its citizens in the business relations of life."

65. In *White v. McPheeters* (1882) 75 Mo. 286, NORTON, J., had quoted with approval the statement in 2 Washburn, Real Property (6th ed.) § 1557, that "if the contingency is in the person who is to take, as where the remainder is limited to the heirs of one now alive, there is no one who can make an effectual grant or devise of the remainder." The court in *White v. McPheeters* thought that the contingent remainder in that case was an alienable interest.

66. There is still some doubt as to the nature of the statutory remainder in an estate tail, and this doubt may have influenced the court in *Godman v. Simmons*. See 1 Law Series, Missouri Bulletin, p. 19.

67. (1894) 124 Mo. 367, 27 S. W. 551.

68. (1894) 125 Mo. 400, 28 S. W. 632. Cf., *Clarke v. Fay* (1910) 205 Mass. 228.

69. *Brown v. Rogers* (1894) 125 Mo. 392, 28 S. W. 630. For a criticism of this holding, see 1 Law Series, Missouri Bulletin, p. 22.

70. (1902) 173 Mo. 257, 73 S. W. 180.

71. (1905) 193 Mo. 502, 92 S. W. 224.

72. (1915) 267 Mo. 91, 183 S. W. 580.

ant's heirs of her body, with the same result. Similar facts existed in *Summet v. City Realty Co.*,⁷³ where the court said that it had "uniformly held that contingent remainders are alienable the same as are other estates."

It can no longer be doubted that a contingent remainder is an "interest" in land within the meaning of the Missouri statute. The early common law view of contingent remainders as mere "possibilities" may therefore have no place in Missouri law to-day. Indeed, both vested and contingent remainders are mere idealities; the one no less imaginary than the other;⁷⁴ and the time has come when both may be stripped of their feudal clothes of uncertainty and put into a garb of substantial fiber. This being true, it may well be doubted whether the distinction should be continued between those contingencies which affect the person, and those which affect the completeness of the title which is conferred on an ascertained person.⁷⁵ Although the Missouri court has not expressly repudiated it, it is unlikely that it will be respected since the decision in *Brown v. Fulkerson*, and it is probably safe to say that any contingent remainder may be aliened by deed under the statute, whether the object of the gift or limitation of the remainder be or be not ascertained. Thus, the Missouri court has read the explicit provision of the English statute into Missouri law.

Of course the alienee of a contingent remainder takes it subject to the contingency, just as the alienor had it.⁷⁶ A restraint on the alienation of a contingent remainder while it continues contingent

73. (1907) 208 Mo. 501, 106 S. W. 614. In *Armor v. Lewis* (1913) 252 Mo. 568, 589, 161 S. W. 251, BOND, J., dissenting, and: "That all estates in remainder are conveyable by the owner and available to his creditors is uncontrovertible." The possibility of conveying a contingent remainder seems to have been overlooked in *Faris v. Ewing* (1916) 183 S. W. 280, as was pointed out in a note on that case in 12 Law Series, Missouri Bulletin, 48, 50.

Equity will decree specific performance of a contract for the sale of an alienable contingent remainder. *Matter of Asch* (1902) 75 App. Div. (N. Y.) 486.

74. See Professor Kales' valuable discussion of this point in his book on *Future Interests in Illinois*, § 78.

75. See 14 Columbia Law Rev. 67.

76. *Godman v. Simmons* (1892) 113 Mo. 122, 132, 20 S. W. 972. This is the explanation of *Emmerson v. Hughes* (1892) 110 Mo. 627, 19 S. W. 979. It will be noted that Revised Statutes 1909, § 2822, concerning the construction of the term "real estate" has not been referred to in this discussion. It is believed that it has no relevancy.

is probably valid in Missouri," tho it would seem that such a result is not defensible unless the non-alienation is clearly included in the contingency itself.

Involuntary Alienation. The seizure of land on execution depends entirely on statute. The Missouri statute of 1835 provided that the term "real estate" as used in the act on executions should be construed "to include all estate and interest in lands, tenements and hereditaments,"⁷⁷ and it has been continued in the same form to the present time.⁷⁸ There can be no doubt that a vested remainder is subject to execution under this statute.⁸⁰ It seems to have been thought at one time that this statute applied only where the owner of an interest was in some way seised,⁸¹ and if this view had been continued, the statute probably would not have included contingent remainders. But in *White v. McPheeters*,⁸² where land had been conveyed to a trustee for A for life, remainder in fee to her husband should he survive her, with power in A and her husband to direct a conveyance during their joint lives, it was held that the interest of the husband whether vested or contingent (it was plainly the latter) was subject to his creditor's rights to reach it for satisfaction of their debts, and that the joint deed of A and her husband, while the latter was insolvent, was not effective to bar his creditors. While the court was very clearly of the opinion that a contingent remainder was subject to execution under the statute, if must be admitted that the authority of the case on that point is weakened by the fact that the husband and wife also had a power of appointment, the attempted exercise of which in favor of a volunteer rendered the property subject to the claims of his creditors. On this ground the case was distinguished by the

77. Gray, *Restraints on Alienation* (2d ed.) § 46.

78. Revised Statutes 1835, p. 262, § 59.

79. Revised Statutes 1909, § 2194.

80. See *Dunkerson v. Goldberg* (1908) 162 Fed. 120.

81. *McIlvaine v. Smith* (1867) 42 Mo. 45.

82. (1882) 75 Mo. 286. Cf., *Watson v. Dodd* (1873) 68 N. C. 528, where a court of equity refused to order the sale of a contingent remainder, there being no apparent statutory authority; followed in *Howbert v. Cawthorn* (1902) 100 Va. 649, which is criticised in 16 Harv. Law Rev. 377. See also *Daniels v. Eldredge* (1878) 125 Mass. 356; Tiffany, *Real Property*, § 129.

United States Supreme Court.⁸³ Even if *White v. McPheeters* is not actual authority, there can be little doubt that a contingent remainder is subject to execution under the Missouri statute, at least where the person to take is ascertained; and in view of the application of the statute on conveyances in *Brown v. Fulkerson*, even where the person is not ascertained the contingent remainder may be an "interest" which is subject to execution.⁸⁴

It seems to follow from a contingent remainder's being subject to execution that it should be treated as part of the assets of a bankrupt or insolvent. This is the prevailing view under the Bankruptcy Act⁸⁵ which provides that all property which the bankrupt "could by any means have transferred or which might have been levied upon and sold under judicial process against him" shall pass to the trustee in bankruptcy,⁸⁶ although it may be necessary that the person to take should be ascertained.⁸⁷ The question does not seem to have arisen in Missouri.

Both vested and contingent remainders may be made the subject of taxation. The collection of inheritance taxes is probably seldom attempted until the estate vests in possession. The Missouri statute expressly provides that the collateral inheritance tax of this state shall not be collected "until the person or persons liable for the same shall come into actual possession."⁸⁸ It would seem that an inheritance tax imposed after the creation of a contingent remainder in a will is not collectible when the estate vests in possession.⁸⁹

83. In *Brandeis v. Cochrane* (1884) 112 U. S. 344.

84. But see *Roundtree v. Roundtree* (1887) 26 S. C. 450. In Illinois, there is no doubt that a contingent remainder is not subject to execution. *Kales, Future Interests in Illinois*, § 80; *Aetna Life Ins. Co. v. Hoffn* (1914) 214 Fed. 928. Cf., *Hill v. Hill* (1914) 264 Ill. 219.

85. Bankruptcy Act, § 70a (5).

86. *Clowe v. Seavey* (1913) 208 N. Y. 496, 47 L. R. A. 284. See also *National Park Bank v. Billings* (1911) 144 App. Div. (N. Y.) 536, 14 Columbia Law Rev. 66.

87. In *re Wetmore* (1901) 108 Fed. 520; *Goodwin v. Banks* (1898) 87 Md. 425. In *Clowe v. Seavey* (1913) 208 N. Y. 496, a statute made it unnecessary that the person be ascertained. In 1 Preston, *Estates*, p. 76, it is "apprehended" that a remainder to an unascertained person is not "transferable to assignees under a commission of bankrupt." Cf., *Clarke v. Fay* (1910) 205 Mass. 228.

88. Revised Statutes 1909, § 314.

89. In *re Smith* (1912) 135 N. Y. S. 240; 12 Columbia Law Rev. 727. It has been decided in Illinois that a contingent remainder is

PARTITION OF REMAINDERS

The partition of lands is a means of transferring interests which may be voluntary or compulsory.⁹⁰ Voluntary partition between contingent remaindermen may be effected by conveyances of the contingent interests which will operate as any other conveyances, but the anomalous doctrine of parol partition probably has no application because of the necessity that such partition be followed by possession.⁹¹ The common law did not permit the compulsory partition of estates not lying in possession.⁹²

Compulsory partition is now entirely regulated by statute. The Missouri statute has long provided for partition "in all cases where lands, tenements or hereditaments are held in joint tenancy, tenancy in common, or coparcenary, including estates in fee, for life, or for years, tenancy by the curtesy and in dower," and any party interested may ask "for the admeasurement and setting off of any dower interest therein, if any, and for the partition of the remainder, if the same can be done without great prejudice to the parties in interest; and if not, then for the sale of the premises and a division of the proceeds thereof among all of the parties, according to their respective rights and interests."⁹³ It is also provided that "where any party's interest is uncertain or contingent, or the ownership of the inheritance shall depend upon an executory devise, or the remainder shall be contingent so that such parties cannot be named, the same shall be so stated in

not subject to the inheritance tax in that state. *People v. McCormack* (1904) 208 Ill. 437. See also Kales, *Future Interests*, § 185 note.

90. Partition was spoken of as a form of alienation in *Clamorgan v. Lane* (1845) 9 Mo. 442, 462.

91. *Nave v. Smith* (1888) 95 Mo. 596, 8 S. W. 796. See Tiffany, *Real Property*, § 174.

92. *Evans v. Bagshaw* (1869) L. R. 8 Eq. 469, (1870) L. R. 5 Ch. App. 340. See however *Fitts v. Craddock* (1906) 144 Ala. 437, 113 A. S. R. 53; Freeman, *Cotenancy and Partition* (2d ed.) § 440. At common law, a tenancy in parcenary could be partitioned on a writ of partition, but the partition of joint tenancies and tenancies in common depended on the early statutes of 31 and 32 Henry VIII. Equity's Jurisdiction of suits for partition was later. See *Gudgell v. Mead* (1843) 8 Mo. 53; Tiffany, *Real Property*, § 175; 4 Pomeroy, *Equity* (3d ed.) § 1387.

93. Revised Statutes 1909, § 2559, first enacted in its present form in Revised Statutes 1865, p. 611. But the earlier statute in Revised Statutes 1825, p. 609, was not very different.

the petition.”⁹⁴ This clearly contemplates that the existence of uncertain future interests shall be no bar to partition. To determine the extent to which contingent future interests may be partitioned under this statute, requires a close analysis of the cases.

*Reinders v. Koppelman*⁹⁵ is the first leading case. The plaintiff was in possession as owner of an estate *pur autre vie*, and he was also owner of one-fourth of one-half of the remainder; the other half of the remainder had been devised to the “nearest and lawful heirs” of the testator and of his widow who was still alive. The owners of the three-fourths of the first half, the heirs of the testator, and certain other persons denominated the “ostensible heirs” of the testator’s widow, were made defendants. The court admitted that the heirs of the widow could not be determined until her death, but held that under the statute above quoted their interest constituted no bar to the partition.⁹⁶ It will be observed that the interest of the plaintiff in this case was definite and vested, and that he also had a vested *pur autre vie*. The contingent interest represented not more than one-fourth of the remainder.

94. Revised Statutes 1909, § 2563. The substance of this section first appeared in Revised Statutes 1835, p. 422, § 4. One who may contest the will and if successful take by descent, has not a contingent interest within the meaning of the statute. *Robertson v. Brown* (1904) 187 Mo. 452, 86 S. W. 187. This section of the statute was apparently overlooked in *Collins v. Crawford* (1908) 214 Mo. 167, 183, where the court said that “all persons who are legally and equitably interested in the subject matter and result of the suit must be made parties, but such interest in the meaning of said rule must be a present, substantial interest, as distinguished from a mere expectancy of a future contingent interest.”

95. (1878) 68 Mo. 482. *Simmons v. MacAdaras* (1878) 6 Mo. App. 297, was decided about the same time as *Reinders v. Koppelman*, but it seems to have been wholly neglected in later decisions. The suit was begun by the owner of one-third of a leasehold and one-half of the reversion, and the lower court had ordered a sale of the property as a whole. The St. Louis Court of Appeals held this to be error, although leave was given to the plaintiff to ask for the separate partition of the leasehold, and of the reversion. See also *Reinhardt v. Wendel* (1867) 40 Mo. 577. In *Cornelius v. Smith* (1874) 55 Mo. 528, the court seems to have permitted partition of equitable interests which were either wholly in remainder and vested, or subject to equitable dower.

96. The court relied on *Wills v. Slade* (1801) 6 Ves. 498, *Gaskell v. Gaskell* (1836) 6 Sim. Ch. 643 and *Mead v. Mitchell* (1858) 17 N. Y. 210. In all of these cases there were several cotenants of vested present estates, and the principle of representation was applied as to the future estates.

It is difficult to reconcile the court's statements that "the parties not *in esse* are represented by those who take subject to their rights," and that such persons not *in esse* cannot be made parties to the suit "except by naming the owner of the particular estate to which, on certain contingencies, they become entitled." The possibility of a merger of a portion of the particular estate in the remainder was not mentioned by court or counsel, and the case may be distinguished on the ground that a merger had occurred.⁹⁷

In *Preston v. Brant*,⁹⁸ it was held that partition could be maintained by two remaindermen against the life tenant and the other remainderman, the remainder being vested. No contingent interests were involved and the court's reliance on *Reinders v. Koppelman* would seem to have been misplaced. In *Atkinson v. Brady*,⁹⁹ a tenant by curtesy who also owned one-fifth of the vested remainder was permitted to maintain partition as to the remainder against the other remaindermen; the court seemed to rely on the phrase in the statute "for the admeasurement and

97. It seems clear that there may be a merger in such a case. The question of a merger *pro tanto* was raised but not decided in *Simmons v. MacAdaras* (1878) 6 Mo. App. 297, and it might have been raised in *Burns v. Bangert* (1887) 92 Mo. 167, 4 S. W. 677, and in *Atkinson v. Brady* (1892) 114 Mo. 200, 21 S. W. 480, and in *Llewellyn v. Lewis* (1913) 181 Mo. App. 99, 163 S. W. 545. If A is sole tenant for life, with remainder to B and C in fee, and if A conveys his life estate to B, there will be a merger as to a moiety; if A and B are joint tenants or tenants in common for life, with remainder to C in fee, and if A conveys his estate to C, there should likewise be a merger as to a moiety. 3 Preston, Conveyancing, p. 89; *Clark v. Parsons* (1897) 69 N. H. 147; *Harrison v. Moore* (1894) 64 Conn. 344; *Fox v. Long* (1871) 8 Bush (Ky.) 551. But see *contra*, *Johnson v. Johnson* (1863) 7 Allen (Mass.) 196. If A and B are tenants in common for life, remainder (without distinguishing the moieties) to C and D in fee, and if A conveys his estate to C, there would seem to be a merger only as to one-half of A's estate. 3 Preston, Conveyancing, p. 100. But cf., *Badeley v. Vigurs* (1854) 4 E. & B. 71. It is hardly necessary to add that a vested estate will not merge into a contingent remainder.

98. (1888) 96 Mo. 552, 10 S. W. 78. This case was followed in *Hayes v. McReynolds* (1898) 144 Mo. 348, 46 S. W. 161; and in *Doerner v. Doerner* (1900) 161 Mo. 399, 61 S. W. 801. It is sometimes said that the plaintiff in partition must have actual or constructive possession. See *Chamberlain v. Waples* (1905) 193 Mo. 96, 91 S. W. 934. But what is really meant is that the defendant shall not have a possession adverse to the plaintiff. See *Rozier v. Griffith* (1860) 31 Mo. 171. In *Rhorer v. Brockhage* (1883) 13 Mo. App. 397, it was said by THOMPSON, J., for the St. Louis Court of Appeals that "the statute of partition does not contemplate the partition of reversionary interests."

99. (1892) 114 Mo. 200, 21 S. W. 480.

setting off of any dower interest therein, if any, and for the partition of the remainder," but it may be doubted whether the word "remainder" in this statute is to be given its artful meaning. In remanding the case to the trial court, the Supreme Court directed a partition "subject to the curtesy." The possibility of a merger of one-fifth of the curtesy in the remainder was not noted. No reason is perceived why such a merger should not have occurred, and if it did occur the partition might have been subject to four-fifths of the curtesy.

In *Sikemeier v. Galvin*,¹⁰⁰ a testator devised land to his daughter for life and on her death to her heirs, and provided that at any time the land might be sold "by the concurrence in the deed, as parties, of the ostensible heirs," but that the proceeds were to be reinvested after such sale, subject to the interests created by the will. The daughter and one of her sisters who was a possible heir brought suit for partition against the other sister and her two brothers, and a demurrer by the defendants was sustained below. This was held to be error on the authority of *Reinders v. Koppelman*, but it will be noted that since neither of the plaintiffs had a vested interest in the remainder that case was not controlling. The existence of a reversion in the testator's heirs subject to the vesting of the remainder in the daughter's heirs was not noted; probably all the heirs of the testator were parties to the suit. *Sikemeier v. Galvin* would seem to have permitted partition by one contingent remainderman against the others, the life tenant also being a party plaintiff. But since the parties included all of the "ostensible heirs," the authority of the case is much weakened by the provision in the will for a conveyance by them. The case has been explained in *Stockwell v. Stockwell*¹⁰¹ on the ground that it was decided only that the "partition was a mode of alienation and reinvestment to which the parties might resort in carrying out these provisions of the will;" but it is submitted that this explanation neglects the fact that some of the parties were thus being forced to convey against their will.

100. (1894) 124 Mo. 367, 27 S. W. 551.

101. (1914) 262 Mo. 671, 686, 172 S. W. 23. On p. 685, the court through Brown, C., stated that in *Sikemeier v. Galvin* all the "ostensible heirs" were petitioners, but this seems to be an error for the report distinctly states that some of them were defendants and demurred.

In *Sparks v. Clay*,¹⁰² where an undivided one-fourth of a tract of land was conveyed to A, for life and remainder to her heirs, it was held that a child of A, born after final judgment in a partition suit to which A was a party, was bound by the judgment in that suit. A was one of the four tenants in common, two of whom were owners of present estates in fee simple, and on the doctrine of representation of persons not *in esse* as announced in *Reinders v. Koppelman* A was therefore entitled to represent her unborn children. In *Acord v. Beaty*,¹⁰³ the doctrine of representation of remaindermen not *in esse* by the owner of the particular estate was applied to a voluntary partition between various life tenants, which was shown to be "fair and equal when made," and in which the deeds provided for the interests of the remaindermen.¹⁰⁴

In *Hill v. Hill*,¹⁰⁵ it was held that the partition sought would contravene the intention of the testator, and the court's expression of disapproval of *Reinders v. Koppelman* and *Sikemeier v. Galvin* would seem to have been gratuitous. This led to the decision in *Stockwell v. Stockwell*,¹⁰⁶ land had been conveyed to A and her bodily heirs, and A and one of her two children sought partition in a suit against the other. Clearly a reversion remained in the grantor subject to the vesting of the statutory remainders of the estate tail, yet neither he nor his heirs was joined.¹⁰⁷ This alone should have been sufficient for disposing of

102. (1904) 185 Mo. 393, 84 S. W. 40. Cf., *Collins v. Crawford* (1908) 214 Mo. 167.

103. (1912) 244 Mo. 126, 148 S. W. 901. Cf. *Coquillard v. Coquillard* (Ind. App. 1916) 113 N. E. 474. A valuable note on the doctrine of representation was recently published in 16 Columbia Law Review 674.

104. The voluntary parol partition in *Gulick v. Huntley* (1898) 144 Mo. 241, 46 S. W. 154, was contrary to the provisions of the will and hence the question of representation did not arise. A partition will not be made where it would defeat a testator's intention. Revised Statutes 1909, § 2569; *Cubbage v. Franklin* (1876) 62 Mo. 364; *Stevens v. De La Vaulx* (1901) 166 Mo. 20; *Stewart v. Jones* (1909) 219 Mo. 614, 118 S. W. 1. Cf. *Barnard v. Keathley* (1910) 230 Mo. 209, 224, 130 S. W. 306; *Shelton v. Bragg* (1916) 189 S. W. 1175.

105. (1914) 261 Mo. 55, 168 S. W. 1165.

106. (1914) 262 Mo. 671, 172 S. W. 23. In so far as it attempts a history of estates tail in Missouri, the opinion in this case is grossly inadequate. See 1 Law Series, Missouri Bulletin, p. 11.

107. The grantor was doubtless dead, although the fact does not clearly appear except in the objection that his heirs were not joined. On the effect of a failure to join parties having vested interests in a

the case; but the court expressed the opinion that the contingent interests were not susceptible of partition. The attempt to explain the decision in *Sikemeier v. Galvin*, is not convincing,¹⁰⁸ and if it were not for the fact that the result may clearly be rested on the failure to join all necessary parties, the decision would have the effect of overruling that case.

The most recent case, decided since this study was begun, is *Shelton v. Bragg*.¹⁰⁹ A testator devised land to his daughter, Arcelia, for her "to use, occupy and enjoy during her natural life," and directed that upon her death the land "or the proceeds thereof" should be divided among his five other children "or their heirs" and the heirs of Arcelia. During the continuance of the life estate, the life tenant and two other children of the testator sought partition of the land devised, alleging that Arcelia tho long married had never had any children, and on account of her health did not expect to have any. The remaining three children of the testator were made defendants, but one of them had conveyed his interest to another. It may be assumed that the heirs of Arcelia were to have only one sixth of the remainder, tho this was not clearly provided. Since Arcelia had given up having children (her age does not appear), her brothers and sisters were her *ostensible heirs* within the meaning of that term as it was used in *Reinders v. Koppelman* and *Sikemeier v. Galvin*, and all of them were parties. Furthermore, Arcelia as a party might conceivably have *represented* her unborn children under the doctrine of *Sparks v. Clay*. The five-sixths of the remainder given to the other five children must have been contingent on their surviving Arcelia, for it was given to them "or their heirs"; unless *or* be read as *and*,¹¹⁰ for which there seems to be no reason in this case, all of the remainder was contingent.¹¹¹ The reversion pending

partition proceeding, see *Hiles v. Rule* (1893) 121 Mo. 248, 25 S. W. 959; *Cochran v. Thomas* (1895) 131 Mo. 258, 33 S. W. 6.

108. See *ante*, p. 26.

109. (1916) 189 S. W. 1174.

110. While "*or* and *and* are not treated as interchangeable in judicial exposition," *Eckle v. Ryland* (1913) 256 Mo. 424, they may be interchanged to effectuate a testator's intention. *Maguire v. Moore*, (1891) 108 Mo. 267, 273; *Owen v. Eaton* (1893) 56 Mo. App. 563. See also *White v. Crawford* (1813) 10 Mass. 183.

111. In *Young v. Hyde* (1913) 255 Mo. 509, the court seemed to be willing to adjudicate a title in disregard of the common law rule

the vesting of the remainder was probably in the parties as heirs of the testator, no residuary devise appearing. The situation was therefore very similar to that in *Sikemeier v. Galvin*, and on the authority of that case a partition might have been allowed. But the Supreme Court reversed the decree of partition rendered by the circuit court for two reasons: first, because a partition would be contrary to the will of the testator; second, apparently, because the interests were not subject to partition under *Stockwell v. Stockwell*. As to this second ground, *Stockwell v. Stockwell* was not controlling unless the reversioners were not parties. The court's quotation of the gratuitous condemnation of *Sikemeier v. Galvin*, made in *Hill v. Hill* and previously quoted in *Stockwell v. Stockwell*, indicates that *Sikemeier v. Galvin* is to be wholly abandoned. The decision in *Shelton v. Bragg* may be rested, however, on the testator's intention that there should be no partition.

It is apparent from this review of the decisions that the last word has not been spoken concerning the partition of remainders. In the simple case where A is tenant for life, with remainder to B and his heirs, neither A nor B is entitled to partition for there is in no sense a contencancy. Where A and B are tenants for the life of A, remainder to C and his heirs, either A or B may partition without in any way affecting the remainder. If A owns one-half of the tract in fee, the other half being vested in B for life, remainder to B's heirs, either A or B may have partition and B would represent his heirs sufficiently to bind them; if the remainder is to the heirs of C, B as tenant of the particular estate may possibly represent C's heirs so as to bind them.¹¹² Where A is sole tenant for life, with the remainder in fee vested in B and C, *Preston v. Brant* would seem to permit either B or C to maintain partition against the other and A may be joined as a party, although it seems clear that A's interest would not neces-

that a living person is never to be deemed incapable of having issue, basing its decision on the "physical impossibility" of the birth of children.

112. In *Betz v. Farling* (1916) 274 Ill. 107, A and B were tenants in common for their respective lives, with remainders as to the share of each to his surviving children and if one left no surviving child, remainder to the children of the other. A died leaving children one of whom was permitted to maintain partition against the others and B and his living children.

sarily be affected in such a case.¹¹³ If A is sole tenant for life and owner of a part of a vested remainder,¹¹⁴ it would seem that he may maintain partition as to the remainder against the other owners of the remainder, if their interests are vested;¹¹⁵ and if their interests are contingent *Reinders v. Koppelman* would seem to permit partition wherever the principle of representation of persons not *in esse* can be applied; but the authority of that decision is weakened since the decisions in *Hill v. Hill* and *Stockwell v. Stockwell*, and the narrowing of its doctrine may now be expected. If A is tenant for life, with a contingent remainder to other persons, it would seem folly to permit any partition even though A be joined as a party, and *Sikemeier v. Galvin* is to be confined to its actual facts if indeed it is not to be abandoned altogether since the decisions of *Stockwell v. Stockwell* and *Shelton v. Bragg*; if A is not joined, and if one possible remainderman seeks partition against the others, clearly it should be denied because of the interest of the reversioners; nor should partition be decreed if the reversioners are joined, for there can be no definite basis for division pending the contingency and if a sale were decreed the whole proceeding would be idle in that no advance is made toward division.¹¹⁶

Originally the object of partition was to enable cotenants to enjoy peaceful possession. It was distinctly a remedy to facili-

113. See also *Hayes v. McReynolds* (1898) 144 Mo. 348, 46 S. W. 161. Cf., *Doerner v. Doerner* (1900) 161 Mo. 399, 61 S. W. 801. The general rule in other states is *contra*. See 32 A. S. R. 780. In *Haessler v. Missouri Iron Co.* (1892) 110 Mo. 188, 19 S. W. 75, partition was decreed subject to a perpetual mining lease. In *Beckner v. McLinn* (1891) 107 Mo. 277, 17 S. W. 819, a homestead was included in the partition sale under the statutory provision.

114. If the court were pressed to decide that there is a merger in such a case, the result of the partition suit would probably be the same. In *Jameson v. Hayward* (1895) 106 Cal. 682, there were several owners of a term and one of them owned the reversion; the court ordered a partition of the term only, leaving the reversion unaffected and ignoring the merger on equitable grounds.

115. *Atkinson v. Brady* (1892) 114 Mo. 200, 21 S. W. 480.

116. This has been recognized by the Illinois court which has persistently refused to permit partition of remainders after a life estate where the interests of the remaindermen could not be definitely ascertained until the death of the life tenant. *Seymour v. Bowles* (1898) 172 Ill. 521; *Ruddell v. Wren* (1904) 208 Ill. 508. And partition was recently refused where the remainder was "vested in quality" but "contingent in quantity." *Richardson v. VanGundy* (1916) 271 Ill. 476.

tate the enjoyment of present estates in possession. But the broad terms of the Missouri statute seem to have authorized its extension to such future interests as vested remainders although the actual step was taken in *Reinders v. Koppelman* and *Preston v. Brant* apparently without appreciation of its significance. But it seems undesirable that this principle should be extended to permit the partition of contingent future interests, and *Stockwell v. Stockwell* therefore represents a proper disposition to restrict *Reinders v. Koppelman*.

MANLEY O. HUDSON.

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NOTES ON RECENT MISSOURI CASES

CONSTITUTIONAL QUESTION—HOW RAISED TO CONFER JURISDICTION ON SUPREME COURT. *Donoho v. Missouri Pac. Ry. Co.*¹—Section 12, Article VI of the Constitution of Missouri provides, among other things, that the Supreme Court shall have appellate jurisdiction "in cases involving the construction of the Constitution of the United States or of this State." This language is general, and, as there is no statute declaring how such questions must be raised in the trial court so as to confer jurisdiction on the Supreme Court, much litigation has gone to the appellate courts involving this point of practice.

The Supreme Court has ruled that it will not take jurisdiction on the ground that a constitutional question is involved unless the record of the case in the trial court affirmatively shows that the protection of the Constitution was expressly invoked by one of the parties in some method recognized in pleading and practice, that it was decided adversely to the party appealing, and that he saved his exceptions to the adverse ruling of the court.² The question is not properly presented to the Supreme Court unless it is imbedded in the record of the trial

*Absent on leave 1916-17. During Professor Hudson's absence the Law Series will be in charge of Dean James.

1. (Mo., 1916) 184 S. W. 1149.

2. *Bennett v. Mo. Pac. Ry. Co.* (1891) 105 Mo. 642, 16 S. W. 947. See *Turley v. Bates* (1895) 131 Mo. 548, 33 S.W. 172; *Parlin & Orendorff Co. v. Hord* (1898) 145 Mo. 117, 46 S. W. 753; *Ash v. City of Independence* (1898) 145 Mo. 120, 46 S. W. 749; *State v. Raymond* (1900) 156 Mo. 117, 56 S. W. 894; *Coleman v. Cole* (1900) 162 Mo. 516, 63 S. W. 89; *Hardin v. City of Carthage* (1902) 171 Mo. 442, 71 S. W. 673; *Brown v. M. K. & T. Ry.* (1903) 175 Mo. 135, 74 S. W. 973; *State ex rel. v. Smith* (1903) 176 Mo. 44, 75 S. W. 468; *City of Tarkio v. Loyd* (1903) 179 Mo. 600, 78 S. W. 797;

below.³ The jurisdiction of the Supreme Court does not depend upon the validity of the constitutional question, that is whether a constitutional right has actually been violated; it is enough if a clear and substantial claim is involved.⁴ But if only a sham question is raised, for example, if appellant in the court below has invoked the protection of the Constitution merely to have the Supreme Court instead of the court of appeals try his appeal, the Supreme Court will transfer the case to the court of appeals. The Supreme Court will consider it a sham question if appellant in his brief merely mentions the constitutional question without specification or argument.⁵

The constitutional question generally must be raised during the trial at the earliest possible moment that good pleading and orderly procedure will admit. Otherwise it will be waived.⁶ Where possible, it should be raised in the pleadings. The case of *Dudley v. Wabash R. R. Co.*,⁷ goes so far as to hold that where the question could have been raised in the answer, it is too late, after all the evidence is in, for defendant to amend his answer so as to raise the constitutional question. Many cases decide that it is too late to raise the point in a motion for a new trial, except where there has been no previous opportunity.⁸ *Saxton National Bank v. Bennett*⁹ seems to conflict somewhat with this principle. In this case the constitutionality of two statutes was raised for the first time in an amended motion for a new trial. It did not appear whether there had been an earlier opportunity to raise the question. The court however did not discuss the point, but held that it had jurisdiction. Altho the court seemed to ignore the point as to when the constitutional question might be raised during the trial, it must be assumed, as no contrary facts appear, that it could not have been raised earlier than in the amended motion for a new trial. But later cases, as indicated by those cited, remove all doubt on this point by holding that the constitutional question must be raised at the earliest possible moment during trial.

A few cases hold that in raising the constitutional question a specific reference to the provision of the Constitution violated is not necessary.¹⁰ *State v. Smith*¹¹ goes so far as to decide that even

Hutchinson & Co. v. Morris Bros. (1905) 190 Mo. 673, 89 S. W. 820; *Shell v. Mo. Pac. Ry. Co.* (1906) 202 Mo. 339, 100 S. W. 617; *Municipal Securities Corp. v. Kansas City* (Mo. 1916) 186 S. W. 989; *Riley Penn., Oil Co. v. Symonds* (Mo. App. 1916) 190 S. W. 1038.

3. *City of Tarkio v. Clark* (1904) 186 Mo. 285, 85 S. W. 329.

4. *Ellis Investment Co. v. Jones* (Mo., 1916) 187 S. W. 716.

5. *Brookline Canning & Packing Co. v. Evans* (1911) 238 Mo. 599, 142 S. W. 319; *Botts v. Wabash Ry. Co.* (1913) 248 Mo. 56, 154 S. W. 53.

6. *Lohmeyer v. Cordage Co.* (1908) 214 Mo. 685, 113 S. W. 1108.

7. (1911) 238 Mo. 184, 142 S. W. 338.

8. *Barber Asphalt Paving Co. v. Ridge* (1902) 169 Mo. 376, 68 S. W. 1043; *Lohmeyer v. Cordage Co.* (1908) 214 Mo. 685, 113 S. W. 1083; *Hartsler v. Metropolitan Ry. Co.* (1908) 218 Mo. 562, 117 S. W. 1124; *George v. Quincy Ry. Co.* (1913) 249 Mo. 197, 155 S. W. 453; *Whitsett et al. v. City of Carthage* (Mo., 1915) 184 S. W. 1185.

9. (1897) 138 Mo. 494, 40 S. W. 97.

10. *State v. St. Louis Court of Appeals* (1888) 97 Mo. 276, 10 S. W. 874. See *Baldwin v. Fries* (1890) 103 Mo. 286, 15 S. W. 760.

11. (1897) 141 Mo. 1, 41 S. W. 906.

tho the appellant makes no reference during the trial to the violation of any constitutional right, yet, if a constitutional question is necessarily involved in the decision of the case, the Supreme Court will take jurisdiction. The court admits the general rule to be that the protection of the Constitution must be expressly invoked but distinguishes the case on the ground that it was submitted to the trial court on an agreed statement of facts. The prevailing view, however, is that in invoking the protection of the Constitution, the exact provision alleged to be violated must be stated. A general reference is not sufficient.¹² *Shaw v. Goldman*¹³ decides that even tho the substance of the constitutional provision alleged to be violated is stated in the objection, that is not sufficient. Tho this seems to be the weight of authority elsewhere,¹⁴ such a requirement seems nevertheless to be unduly technical. The court gives as a reason against allowing a general objection to the constitutionality of a legislative enactment, that such an objection makes it "possible to contend in the trial court it offended against one provision of the Constitution, while in the appellate court it might be claimed it violated a totally different provision of the Constitution, and in this way the trial court might be adjudged guilty of error in respect to a matter that was never called to its attention and upon which it never ruled." But it is obvious that this reason does not exist when the substance of the constitutional provision alleged to be violated is set forth. The appellate court could under such circumstances as easily determine whether the appellant relies on the same constitutional provision in both the trial and the appellate court as when he in the lower court gives in his objection the exact section and article. In fact an objection that a certain statute deprived the appellant of his property without due process of law is more definite than for him to say that by reason of said statute his rights under Sec. 1 of the Fourteenth Amendment of the Constitution of the United States are infringed, because this section secures many rights other than those involving security of property. But under the weight of authority an objection that the appellant is being deprived of his property without due process of law does not raise a constitutional question. There are, however, a few cases which hold that it is sufficient to set forth in the objection the substance of the constitutional provision alleged to be violated.¹⁵

12. *Ash v. City of Independence* (1902) 169 Mo. 77, 68 S. W. 888; *State v. Smith* (1903) 176 Mo. 44, 75 S. W. 468; *St. Joseph v. Life Insurance Co.* (1904) 183 Mo. 1, 81 S. W. 1080; *Excelstor Springs v. Ettenson* (1904) 188 Mo. 128, 86 S. W. 255; *State v. Kushner* (1907) 207 Mo. 605, 108 S. W. 60; *Lohmeyer v. Cordage Co.* (1908) 214 Mo. 685, 113 S. W. 1108.

13. (1904) 183 Mo. 461, 81 S. W. 1223.

14. *Anderson v. State* (1907) 2 Ga. App. 1, 58 S. E. 401, and cases cited therein; *Rose v. State* (1908) 171 Ind. 662, 87 N. E. 103; 3 *Corpus Juris* 712.

15. *State ex rel v. St. Louis Court of Appeals* (1888) 97 Mo. 276, 10 S. W. 874; *Adkins v. City of Richmond* (1900) 34 S. E. 967.

Where the decision of the constitutional question is not essential to the disposition of the appeal, there is some confusion in the cases as to whether the supreme court will take jurisdiction. The rule supported by the weight of authority is that jurisdiction will be taken even tho the appeal can be disposed of on other grounds.¹⁶ This is a sound doctrine in view of the principle that supreme courts will not decide constitutional questions presented in the record if the appeal can be disposed of on other grounds.¹⁷ If the Supreme Court should say it will not take jurisdiction unless a ruling on the constitutional question is essential to the disposition of the case, it would in effect be saying to the court of appeals that the other points in the case should be decided in appellant's favor. However LAMM, J., in a strong *dictum* in *Ranney v. Cape Girardeau*,¹⁸ states that "in order to bring an appeal within our jurisdiction on a constitutional ground it must appear that a constitutional question is essential to the determination of the case." A line of cases is cited as sustaining this principle, but they decide only that to confer jurisdiction on the Supreme Court, it must appear that the determination of a constitutional question was essential to the disposition of the case by the trial court.¹⁹

There are certain constitutional rights which cannot be expressly waived. A defendant indicted for a felony cannot agree to be tried by a jury of less than twelve, which right is guaranteed to him under Art. II, Sec. 22 of the Missouri Constitution.²⁰ If the general doctrine laid down in the Missouri cases that a party waives his constitutional right by failing to object at the earliest opportunity to its violation applies to all cases, it becomes an interesting question as to what becomes of the doctrine that certain constitutional rights cannot be waived by agreement. There seems to be no case involving an alleged waiver of such a constitutional right because of a failure to object at the proper time.

In *Donoho v. Mo. Pac. Ry. Co.*, *supra*, the plaintiff sued because of an injury to his race horse while in transit over defendant's railroad. The defendant pleaded that it was not liable because the plaintiff had not fulfilled the terms of the shipping contract and objected to a certain instruction granted by the court claiming that it impaired the obligation of the shipping contract in violation of Section 15, Article 2 of the Constitution of Missouri, and also in violation of the provisions of the Fourteenth Amendment to the Federal Constitution. This case

16. *Dorrance v. Dorrance* (1912) 242 Mo. 625, 148 S. W. 94; *Skinner v. St. Louis Ry. Co.* (1914) 254 Mo. 228, 162 S. W. 327; *Stanley v. St. Louis Ry. Co.* (1914) 254 Mo. 237, 162 S. W. 240.

17. *Ex parte Randolph* (1833) 2 Brock 447; *Elliott v. Oliver* (Ore., 1892) 29 Pac. 1.; Cooley, Constitutional Limitations p. 163.

18. (1914) 255 Mo. 514, 164 S. W. 582.

19. *State ex rel. v. Smith* (1897) 141 Mo. 1, 41 S. W. 906; *Kirkwood v. Meramac Highlands Co.* (1900) 160 Mo. 111, 60 S. W. 1072; *State ex rel. v. Smith* (1903) 176 Mo. 44, 75 S. W. 468; *City of Tarkio v. Boyd* (1903) 179 Mo. 600, 78 S. W. 797.

20. *State v. Mansfield* (1867) 41 Mo. 471.

was transferred from the Kansas City Court of Appeals to the Missouri Supreme Court on the ground that a constitutional question was involved. The Supreme Court properly ruled that if a constitutional question existed, it was properly presented, but that none existed because an erroneous construction of a contract does not impair the obligation of the contract or deprive the defendant of his property without due process of law as guaranteed by the Missouri and Federal Constitutions. As pointed out in the opinion, the Supreme Court will not assume for jurisdictional reasons that the court of appeals will misconstrue a contract. Any contrary assumption would amount to saying that the court of appeals either does not know the law or that it would decide contrary to the law. So the case was properly remanded to the court of appeals.

GARDNER SMITH

EVIDENCE—ADMISSION OF PAROL EVIDENCE IN THE CONSTRUCTION OF WILLS—AMBIGUITIES—DECLARATIONS OF THE TESTATOR. *Mudd v. Cunningham*.¹—George Cunningham in his will purported to devise to his daughter Mary "the south half of the south half of the northeast quarter of section 26." However, it appeared that the testator did not own, and had never claimed, the land above described. In another paragraph of the will he gave the southwest fourth of the northeast quarter of section 26, which he did own, to four other children. The south half of the south half of the northwest quarter had been owned by the testator and was not disposed of by the will. Mary Cunningham had conveyed this land in the northwest quarter to the plaintiff, Mudd, who brought this action to determine title. The defendants, children of the testator, claimed an interest in the land upon the ground that as to it their father had died intestate. Evidence was admitted that the scrivener in drawing up the will had by mistake written northeast instead of "northwest" before the words "quarter of section 26" in the devise to Mary, but the trial court rejected evidence offered by the plaintiff of declarations made by the testator as to lands intended to be conveyed by the will. However, upon the other evidence the plaintiff was adjudged to be owner of the land involved. This judgment the Supreme Court affirmed² upon the ground that the misdescription of the land in the will was a latent ambiguity and the Missouri rule "permits the use of extrinsic evidence to explain the said latent ambiguity after it had been made to appear."

The pole star of construction of wills is the intention of the testator,³ and a statute⁴ in Missouri requires courts to have due regard to the

1. (1915) 181 S. W. 386.

2. BOND, J., dissented but gave no opinion.

3. *Hall v. Stephens* (1877) 65 Mo. 577; *Nichols v. Boswell* (1890) 103 Mo. 151, 15 S. W. 343; *Meiners v. Meiners* (1903) 179 Mo. 614, 78 S. W. 795.

4. Revised Statutes 1909, § 583. This act is declaratory, merely, of the common law. *Yocum v. Siler* (1900) 160 Mo. 281, 61 S. W. 268; *Gannon v. Park* (1906) 200 Mo. 75, 98 S. W. 471.

true intent of the testator in all matters. This intention is not subject to technical rules of construction⁵ and when found will be enforced if not inconsistent with some rule of law.⁶ Testamentary dispositions of property are, however, required to be in writing, and formally executed and attested⁷ and the testator's intention must be found in the will itself or these requirements will be defeated.⁸

To be effectuated, then, the intention of the testator must appear in the formal instrument. But in interpreting a will courts are not limited to a consideration of words alone. "It was a part of the stiff formalism of earlier interpretation, not only that the law should fix the meaning of words and phrases but also that all aids to the meaning must be found in the document itself."⁹ However, courts have been reluctantly forced to realize that words can never be absolute and fixed in meaning,¹⁰ but are necessarily relative to the person using them, the circumstances by which he is surrounded, and the persons or objects to which they are applied. Thus "the true intent and meaning of the testator can be best ascertained by the courts. . . . putting themselves, as far as may be, in the place of the testator and reading all his directions therein contained in the light of his environment at the time it was made."¹¹ But this is not a negation of the requirement that the intention of the testator must be found in the will. In *Nichols v. Boswell*¹² it is pointed out that extrinsic evidence cannot be "resorted to to ascertain the *intention* of the testator; to do so would be to defeat the requirement that all wills shall be in writing." The court here voices the distinction between admitting parol evidence to show the testator's *intention* and to show the *meaning* of the intention he has expressed in his will,¹³ and while the Missouri decisions do not generally use the word "meaning" and often use "intention" in its place, they recognize a distinction between the testator's intention generally and the meaning of that intention as expressed in the will.¹⁴ The admission of evidence of extrinsic circumstances in aid of interpretation is necessary in order to give the court seeking the meaning of the written words the standard of the individual maker, and it is well

5. *Kendrick v. Cole* (1876) 61 Mo. 572; *Burnet v. Burnet* (1912) 244 Mo. 491, 148 S. W. 872; *State ex rel. Gordon v. McVeigh* (1914) 181 Mo. App. 566, 164 S. W. 673.

6. *Small v. Field* (1890) 102 Mo. 104, 14 S. W. 815; *O'Day v. O'Day* (1906) 193 Mo. 62, 91 S. W. 921.

7. Revised Statutes 1909, § 537.

8. *Hall v. Stephens* (1877) 65 Mo. 677; *Nichols v. Boswell* (1890) 103 Mo. 151, 15 S. W. 343; *Meiners v. Meiners* (1903) 179 Mo. 614, 78 S. W. 795.

9. Wigmore, Evidence § 2470.

10. For the history of this principle, see Wigmore, Evidence § 2462.

11. *Murphy v. Carlin* (1892) 113 Mo. 112, 117, 20 S. W. 786.

12. (1890) 103 Mo. 151, 157, 15 S. W. 343.

13. See Wigmore, Evidence § 2459.

14. See *Gregory v. Cowgill* (1854) 19 Mo. 415; *Mersman v. Mersman* (1896) 136 Mo. 244, 37 S. W. 909; *Hurst v. Von de Veld* (1900) 153 Mo. 239, 58 S. W. 1056; *Willard v. Darrah* (1902) 168 Mo. 660, 68 S. W. 1023; *Missouri Baptist Sanitarium of St. Louis v. McCune* (1905) 112 Mo. App. 332, 87 S. W. 93; *Griffith v. Witten* (1913) 252 Mo. 641, 161 S. W. 708.

settled in this state that some parol evidence is, in general, admissible when the problem before the court is the construction of a will.¹⁵

To what extent such evidence is admissible is not clear from the Missouri decisions. In language the courts have adhered to the rules that "extrinsic evidence cannot be given to add to or vary the terms of the written instrument"¹⁶ and that "the plain meaning of the will cannot be disturbed."¹⁷ The first is based upon the requirement that the intention of the testator must be incorporated in a formal instrument, and the validity of this reason cannot be questioned. Courts, as pointed out in *Mudd v. Cunningham*,¹⁸ have no power to reform a will, no matter how clear it may appear that a mistake has been made.¹⁹ Extrinsic evidence is not admissible to show an intent which the testator has not in some manner embodied in his will.²⁰ But it is also a rule in this state that in construing a will in the light of surrounding circumstances, terms may be omitted, changed, or even added to effectuate the intention of the testator.²¹ Thus the result prohibited by the rule against varying the terms of the will is reached in the process of interpretation, and it would seem that the rule against varying the terms of the instrument survives only in those cases in which the testator's real intention cannot be effectuated by construction, as where there is nothing in the will into which the real intention can be read or where the language used in the will shows that the testator was not himself certain of his intention.

The rule against disturbing a plain meaning is based upon the theory that the words used by a given testator are fixed and absolute in meaning. This rule often appears in the Missouri decisions but has in fact little force today. When the courts adopted the principle

15. See *Clotilde v. Lutz* (1900) 157 Mo. 439, 57 S. W. 1018; *Tebow v. Dougherty* (1907) 205 Mo. 315, 103 S. W. 985. In *Gregory v. Cowgill* (1854) 19 Mo. 415; *McQueen v. Lilley* (1895) 131 Mo. 9, 17, 31 S. W. 1043; *Roberts v. Crume* (1902) 173 Mo. 572, 579, 73 S. W. 662; *Missouri Baptist Sanitarium of St. Louis v. McCune* (1905) 112 Mo. App. 332, 338, 87 S. W. 93, the rule is stated negatively,—that is such evidence must not be looked to unless the terms are not clear or an ambiguity has arisen from its clear terms. These dicta are clearly erroneous as it is impossible to declare the meaning of any provision, no matter how clear in statement and unambiguous in fact without a knowledge of facts *dehors* the instrument. Inconsistent statements of the rules naturally result from the refusal of the courts to recognize the "parol evidence rule" as a principle of the substantive law of wills and not a rule of evidence. See Wigmore, Evidence § 2400.

16. *Hall v. Stephens* (1877) 65 Mo. 670; *Small v. Field* (1890) 102 Mo. 104, 14 S. W. 1815; *Krechter v. Grofe* (1901) 166 Mo. 385, 66 S. W. 358; *Brown v. Tuschoff* (1911) 235 Mo. 499, 138 S. W. 497.

17. *Bradley v. Bradley* (1857) 24 Mo. 311; *Drake v. Crane* (1894) 127 Mo. 85, 29 S. W. 990; *Missouri Baptist Sanitarium of St. Louis v. McCune* (1905) 112 Mo. App. 332, 87 S. W. 93.

18. (1915) 181 S. W. 386.

19. *Goode v. Goode* (1856) 22 Mo. 518; *Mudd v. Cunningham* (1915) 181 S. W. 386. But see *Thomson v. Thomson* (1892) 115 Mo. 56, 21 S. W. 1085.

20. *Lehnhoff v. Theine* (1904) 184 Mo. 386, 83 S. W. 469. See also *Asten v. Asten* (1894) 3 Ch. 260.

21. *Prosser v. Hardesty* (1890) 101 Mo. 593, 14 S. W. 628; *Thomson v. Thomson* (1892) 115 Mo. 56, 21 S. W. 1085; *Briant v. Garrison* (1899) 150 Mo. 655, 52 S. W. 361; *Mudd v. Cunningham* (1915) 181 S. W. 386.

of construing a will in the light of surrounding circumstances, they accepted the standard of the particular testator in interpreting the terms used by him, and recognized that the "plain meaning" of words differs with different writers.²² The Missouri courts have, however, refused to apply this principle where the terms of the will are definite and capable of being enforced and no ambiguity arises upon their application.²³ But with the exceptions noted, it seems that the rules against varying the terms of the will, and against disturbing the plain meaning do not in fact operate against the admission of parol evidence in this state, but are in effect avoided and exist only in the *dicta* and loose language of the decisions.

When the court in the principal case states that an established Missouri rule permits the explanation of latent ambiguities by extrinsic evidence, it but echoes the classical distinction between latent and patent ambiguities,²⁴ which has been repeatedly voiced by the courts of this state. According to this classification,²⁵ a patent ambiguity is an inconsistency or a doubtful expression in the language of the will, and a latent ambiguity an uncertainty as to the testator's meaning arising in the attempted application of apparently clear and definite terms of the will.²⁶ Evidence of extrinsic circumstances is rejected in the former case and admitted in the latter upon the following theory: that since the intention must be found in the will, if the ambiguity is patent, the evidence would show an intention different from that expressed, and hence, the inconsistent provisions must fail for uncertainty unless they can be explained by an interpretation of the will itself. But if the ambiguity is latent, the intention disclosed by extrinsic evidence only shows which of a number of apparent meanings, all consistent with the terms of the will, is the true one. As a latent ambiguity cannot be found except by looking at circumstances *dehors* the will, the distinction between parol evidence to show and parol evidence to explain the latent ambiguity must be recognized.²⁷

Where there is a latent ambiguity the uncertainties as to the testator's meaning are of two kinds; either the terms are applicable equally, or substantially so,²⁸ to two or more persons or objects, or the property or person has been so mistakenly described that according to

22. See Wigmore, Evidence § 2461.

23. See *Mersman v. Mersman* (1896) 136 Mo. 244, 37 S. W. 909.

24. See 6 L. R. A. (N. S.) 946.

25. *Jennings v. Briceadine* (1869) 44 Mo. 332. In the early case of *Davis v. Davis* (1843) 8 Mo. 56, the court does not distinguish between patent and latent ambiguities but says "some patent ambiguities allow a resort to extrinsic evidence and others do not." In *Riggs v. Myers* (1855) 20 Mo. 239, the distinction between an inaccuracy and an ambiguity in language is made clear.

26. *Mudd v. Dillon* (1901) 166 Mo. 110, 120, 65 S. W. 973; *Robards v. Brown* (1901) 167 Mo. 447, 67 S. W. 245; *McMahan v. Hubbard* (1908) 217 Mo. 624, 118 S. W. 481.

27. See *Willard v. Darrah* (1902) 168 Mo. 660, 68 S. W. 1023.

28. This seems to be the rule in Missouri. *Willard v. Darrah* (1902) 168 Mo. 660, 68 S. W. 1023. But see *Hardy v. Matthews* (1866) 38 Mo. 124.

the exact terms of the will there is no property given or no person to take. The first of these is an equivocation, the second a misdescription. Where description has both the elements of equivocation and misdescription, i. e., where as to each of two persons or objects²⁹ it is partially correct and partially incorrect, the case is generally regarded as one of misdescription.³⁰ But in *Willard v. Darrah*³¹ the testator had devised land to his "well beloved nephews John and William Willard," and two sets of brothers by these names claimed the land under this provision, viz., grandsons who had been intimate with the testator, and grandnephews whom the testator scarcely knew. Saying "the description of the person is partly correct and partly incorrect, leaving something equivocal," the court regards as an equivocation what is generally said to be a misdescription, and on principle, the view of the court seems the proper one as the description applies substantially to two or more persons. In the language of a few of the Missouri cases the distinction between an equivocation and a misdescription is noticed,³² but usually the cases are disposed of as was the principal case, by merely calling the uncertainty a latent ambiguity.³³ And as the basis of this distinction between the forms of latent ambiguity is the admission in one case, and the rejection in the other, of declarations made by the testator, and in Missouri, as will be pointed out, this evidence is admissible upon proof of a latent ambiguity—regardless whether such ambiguity is equivocation or misdescription, the courts have not, except by way of a few *dicta*, preserved the useless distinction between the kinds of latent ambiguity.

In the construction of wills in which there are latent ambiguities, the principle of the maxim *falsa demonstratio non nocet*³⁴ is often followed by the Missouri courts, and where the extrinsic evidence shows that a mistake has been made in describing the beneficiary or the property intended, the excessive or false part of the description is rejected in the interpretation, and enough remaining to identify the object

29. The Missouri cases have not recognized the unsound distinction sometimes made between persons and objects. See *Bradley v. Bradley* (1857) 24 Mo. 311. See also *Thomson v. Thomson* (1892) 115 Mo. 56, 21 S. W. 1085.

30. See Wigmore, Evidence § 2474.

31. (1902) 168 Mo. 660, 68 S. W. 1023.

32. *Riggs v. Myers* (1855) 20 Mo. 239; *McMahan v. Hubbard* (1908) 217 Mo. 624, 118 S. W. 481.

33. No case of equivocation in the construction of a will has been found excepting *Willard v. Darrah* (1902) 168 Mo. 660, 68 S. W. 1023, as above explained. Equivocations in deeds are latent ambiguities. *Hardy v. Matthews* (1866) 38 Mo. 124; *Goff v. Roberts* (1880) 72 Mo. 570. The contra decision in *Mudd v. Dillon* (1901) 166 Mo. 110, 65 S. W. 973, is clearly erroneous.

Misdescriptions in wills are latent ambiguities. *Hockensmith v. Slusher* (1858) 26 Mo. 237; *Thomson v. Thomson* (1892) 115 Mo. 56, 21 S. W. 1085; *McMahan v. Hubbard* (1908) 217 Mo. 624, 118 S. W. 481; *Murphy v. Clancy* (1913) 177 Mo. App. 428, 163 S. W. 915. But the rule seems otherwise in the case of deeds. *Hardy v. Matthews* (1866) 38 Mo. 124; *Jennings v. Briceadine* (1869) 44 Mo. 332; *King v. Fink* (1873) 51 Mo. 209.

34. See Wigmore, Evidence § 2476.

or party meant by the testator, this meaning will be effectuated.³⁵ Thus in *Thompson v. Thompson*,³⁶ where there was a devise of "land upon which I now reside," followed by a particular description erroneous in part, the court rejected the false part upon the principle of the maxim. This decision was approved and the maxim again followed in *Board of Trustees of Methodist Episcopal Church, South v. May*,³⁷ where the testatrix devised her "Kansas City property on Olive Street, numbers 705 and 1489," and these numbers were rejected as excessive when it appeared that the only property in Kansas City owned by the testatrix was numbers 1705 and 1914 Olive Street. The maxim is as applicable to persons as to objects,³⁸ and from the Missouri decisions it appears that the courts have applied the maxim in a very liberal manner.³⁹ The result reached in the principal case, viz., that the testator intended to devise the land in the northwest quarter instead of that described as in the corresponding part of the northeast quarter, might well have been based upon a rejection of the word "east," the false part of the description in the devise to Mary; then the remaining part, "the south half of the south half of the north . . . quarter of section 26", would have indicated the land in the northwest quarter owned by the testator and not otherwise devised in the will instead of the corresponding land in the northeast quarter, half of which he did not own and the other half of which he had devised to the other children in the third paragraph of the will.

While a number of the cases admit the evidence of extrinsic circumstances upon the ground that there is a latent ambiguity, the more favored authority is Mr. Wigram's fifth proposition relating to the admission of parol evidence in the interpretation of wills:⁴⁰ "For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given under the will, a court may inquire into every material fact . . . as to the circumstances of the testator . . . for the purpose of

35. See *Riggs v. Myers* (1855) 20 Mo. 239.

36. (1892) 115 Mo. 56, 21 S. W. 1085. GAINTT, J., dissented upon the ground that a definite, tho erroneous, particular description must control over a sufficient general description. See *Rutherford v. Tracy* (1871) 48 Mo. 325; *Calloway v. Henderson* (1895) 130 Mo. 77, 32 S. W. 34.

37. (1906) 201 Mo. 360, 368, 99 S. W. 1093.

38. *Skinker v. Haagsma* (1889) 99 Mo. 208, 12 S. W. 659. See *Thomson v. Thomson* (1892) 115 Mo. 56, 21 S. W. 1085; *Gordon v. Burris* (1897) 141 Mo. 602, 43 S. W. 642; *Willard v. Darrah* (1902) 168 Mo. 660, 68 S. W. 1023.

39. *McMahan v. Hubbard* (1908) 217 Mo. 624, 118 S. W. 481. The mistake in the description was similar to the error in the will in *Mudd v. Cunningham* and the land intended was identified by the rejection of the false part. As the erroneous description was the only allusion to the land in the will it appears that the narrow doctrine of *Kurtz v. Hibner* (1870) 55 Ill. 514, is not law in Missouri, and "my land" or the equivalent of these words is not necessary as an identification of the land erroneously described. In *King v. Fink* (1873) 51 Mo. 209, the court refused to apply the maxim in construing a deed which contained an error similar to that in the will in *McMahan v. Hubbard*.

40. Quoted from Wigram, *Treatise on Extrinsic Evidence in Aid of the Interpretation of Wills*, in Thayer, *Cases on Evidence*, 2d ed., p. 917.

enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. The same (it is conceived) is true of every other disputed point respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of the testator's words."⁴¹ In *Small v. Field*⁴² and *McMahan v. Hubbard*,⁴³ this doctrine is said to be well settled law in this state. However, most of the decisions which apply this rule are cases in which the terms of the will are clear on their fact but uncertainty is produced by extrinsic evidence, and by *dicta* the cases embraced within the proposition are impliedly classed as latent ambiguities.⁴⁴ But the language of the doctrine quoted is equally as applicable to cases in which the doubt as to the testator's meaning is created by obscure or inconsistent language in the will, and it appears that extrinsic evidence is admissible to explain such indefinite language,⁴⁵ tho no case has been found which expressly holds that a patent ambiguity may be resolved by evidence *dehors* the instrument. Hence, in admitting extrinsic evidence it seems to be immaterial whether the ambiguity is patent or latent. But even under this doctrine extrinsic evidence of intention could not be given where the will itself shows the testator was not himself certain as to his intention, because to do so would be to make a new will for the testator and violate the requirement that the intention must be found in the will.⁴⁶ But, since words may be changed, omitted, or even added in interpreting a will which contains on its face obscure or inconsistent provisions,⁴⁷ it is submitted that the classical distinction between patent and latent ambiguities has in effect been abandoned,⁴⁸ and, with the one exception, as a matter of fact no longer controls the admission of parol evidence in this state.

But there is one kind of extrinsic evidence which is suspiciously regarded by courts generally, viz., parol declarations by the testator regarding the disposition of his property by the will. The objection to this direct evidence of intention, as it is often called, is this: that the testator is required by law to declare his intention in a formal

41. *Riggs v. Myers* (1855) 20 Mo. 239; *Creasy v. Alverson* (1868) 43 Mo. 13; *Small v. Field* (1890) 102 Mo. 104, 14 S. W. 1815; *Willard v. Darrah* (1902) 168 Mo. 660, 68 S. W. 1023; *McMahan v. Hubbard* (1908) 217 Mo. 624, 118 S. W. 481.

42. (1890) 102 Mo. 104.

43. (1908) 217 Mo. 624, 118 S. W. 481.

44. *McMahan v. Hubbard* (1908) 217 Mo. 624, 118 S. W. 481; *Mudd v. Cunningham* (1915) 181 S. W. 386.

45. *Nichols v. Boswell* (1890) 108 Mo. 151, 15 S. W. 343; *Garth v. Garth* (1897) 139 Mo. 456, 41 S. W. 238; *Rothwell v. Jamison* (1898) 147 Mo. 601, 49 S. W. 503; *Roberts v. Crume* (1902) 173 Mo. 572, 73 S. W. 662; *Missouri Baptist Association of St. Louis v. McCune* (1905) 112 Mo. App. 332, 87 S. W. 93.

46. *Asten v. Asten* (1894) 3 Ch. 260.

47. *Thomson v. Thomson* (1892) 115 Mo. 56, 21 S. W. 1085; *Briant v. Garrison* (1899) 150 Mo. 655, 52 S. W. 361.

48. In *Thomson v. Thomson* (1892) 115 Mo. 56, 21 S. W. 1085, counsel for appellant submitted this question in his brief but it was not passed upon by the court.

will, and to give effect to any of his declarations not made in this will would be an evasion of this requirement.⁴⁹ Thus oral declarations cannot be given to show an intention not referred to in any way in the will,⁵⁰ or where the will itself shows that the testator was not himself certain as to his intention.⁵¹ But where this rule⁵² is not involved, the reason for the prohibition is gone, and declarations of the testator are not only highly convenient, but often necessary to the court seeking the meaning of the testator's words.⁵³ Some of the Missouri cases seem to distinguish between the oral declarations of the testator and evidence of the testator's feelings toward persons affected by his will,⁵⁴ and the courts are apparently drawing the line between evidence of extrinsic circumstances generally and direct evidence of intention. In other cases, however, no distinction is made between declarations and other evidence of intention *dehors* the will.⁵⁵

In England, declarations are admissible only in cases of strict equivocation.⁵⁶ Or rather it should be stated that where the declarations are admitted there is an equivocation, and where rejected a misdescription, as the basis of this classification of latent ambiguities seems to be the admissibility of this direct evidence of intention, tho there is no valid reason for this distinction.⁵⁷ No rule can be stated for the United States generally as the question has been seldom raised, and in Missouri declarations of intention made by the testator have been admitted in evidence in cases of misdescription without reference to any distinction between the kinds of latent ambiguity.⁵⁸ And while it is often stated that declarations of intention are admissible when there is a latent ambiguity,⁵⁹ the language of the Missouri decisions does not limit the admission of such evidence to such cases but extends the principle to any case of doubtful meaning, even where the uncertainty is patent.⁶⁰ This strengthens the conclusion that, as a matter of fact, the distinction between patent and latent ambiguities is no longer of any importance in this state.

In the principal case the uncertainty as to the testator's meaning was created by a misdescription which the court calls a latent ambigu-

49. *Davis v. Davis* (1843) 8 Mo. 56; *Lehnhoff v. Theine* (1904) 184 Mo. 386, 83 S. W. 469.

50. *Lehnhoff v. Theine* (1904) 184 Mo. 386, 83 S. W. 469.

51. *Asten v. Asten* (1894) 3 Ch. 260.

52. See Wigmore, Evidence § 2425.

53. *Hurst v. Von de Veld* (1900) 158 Mo. 239.

54. *McQueen v. Lilley* (1895) 131 Mo. 9, 31 S. W. 1043; *Snyder v. Taler* (1914) 179 Mo. App. 381, 166 S. W. 1059.

55. *Gregory v. Cowgill* (1854) 19 Mo. 415; *Bradley v. Bradley* (1857) 24 Mo. 311.

56. *Doe d. Hiscocks v. Hiscocks* (1839) 15 M. & W. 363.

57. See Wigmore, Evidence § 2474.

58. *Gordon v. Burris* (1897) 141 Mo. 602, 43 S. W. 642.

59. *Thomson v. Thomson* (1892) 115 Mo. 56, 31 S. W. 1085, Judge Gantt dissenting. But see *Davis v. Davis* (1843) 8 Mo. 56; *Lehnhoff v. Theine* (1904) 184 Mo. 386, 83 S. W. 469.

60. *Mersman v. Mersman* (1896) 136 Mo. 244, 37 S. W. 909; *Hurst v. Von de Veld* (1900) 158 Mo. 239, 58 S. W. 1056; *Webb v. Hayden* (1901) 166 Mo. 39, 65 S. W. 760.

ity explainable by extrinsic evidence, but the declarations of the testator were rejected. If in this state declarations of the testator are merely a part of the extrinsic circumstances, if all latent ambiguities may be resolved by this direct evidence, and, finally, if misdescriptions may be explained by parol statements made by the testator, it would seem that the court should have admitted in evidence the declarations of George Cunningham that he intended Mary to take the land so mistakenly described.

While there is much confusion and conflicting authority in the Missouri cases involving the admission of parol evidence in the construction of wills, the chief source of uncertainty lies in the loose, general language of the courts. It seems that, regardless of the confusing language with which they are clothed, uniform tendencies exist, and that there are definite principles which are applied by the courts in fact in the guise of old rules and apparently upon the basis of distinctions no longer really in force. It is believed that the Missouri courts have developed and generally recognize the following principles: extrinsic evidence, including declarations of the testator, is always admissible to ascertain the meaning of the terms of the will, except where its provisions show either that the testator has not incorporated his intention in the will, or that a definite and clear provision capable of being carried out as expressed is not the testator's real intention. Or stated in terms of the law of wills rather than as a rule of evidence, the real intention of the testator will be effectuated if possible by reading it into the terms of the will by liberal construction, except that the provisions of the instrument will not in substance be added to or omitted.

L. C. LOXIE

EQUITABLE RELIEF AGAINST DEFAMATION. *Wolf v. Harris*.¹—

A reputable physician sought to restrain an insolvent defendant from continuing to publish libelous matter charging the plaintiff with malpractice. The Supreme Court held that an injunction could not be granted. This result, following the decisions in *Life Ass'n of America v. Boogher*,² *Consumer's Gas Co. of Kansas City v. Kansas City Gas-light and Coke Co.*,³ and *Flint v. Hutchinson Smoke Burner Co.*,⁴ seems justifiable under our Bill of Rights⁵ which declares "that no law shall be passed impairing the freedom of speech;⁶ that every person

1. (1916) 184 S. W. 1139.

2. (1876) 3 Mo. App. 173.

3. (1890) 100 Mo. 501, 13 S. W. 874.

4. (1892) 110 Mo. 492, 19 S. W. 804.

5. Constitution, Article II, § 14.

6. This does not prohibit the imposition of liability after publication in certain cases, even tho it interferes in a measure with the freedom of speech. It is constitutional (1) to punish by statute the publication of immoral and indecent matter. *State v. Wye* (1896) 136 Mo. 227, 37 S. W. 938. (2) To punish scandal about the courts. *State v. Shepherd* (1903) 177 Mo. 205, 76 S. W. 79. (3) And to punish matter dangerous to the conduct of military operations in time of war. *Ex parte Vallandigham* (1863) 1

shall be free to say, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact."

But this general rule that equitable relief will not be given against defamation seems to be modified in Missouri to this extent: an injunction will be allowed where the writing or publication is part of a wrong which would be enjoined of itself. Thus in *Hamilton Brown Shoe Co., v. Saxey*⁷ the court enjoined the defendant from interfering with plaintiff's employees by threats, personal violence, intimidation or other means calculated to terrorize or alarm them.⁸ It seems that a growing number of decisions allow injunctions in these cases.⁹

The constitutional requirement of a trial of questions of defamation by a jury presents the greatest obstacle to jurisdiction in equity. The Missouri courts, for instance, cannot direct a verdict for the plaintiff in these cases.¹⁰ It would be unduly narrow to attack the probably sound policy of allowing jury trials in these cases by arguing that the jury was only required in criminal cases or civil cases for damages, and not in proceedings in equity. But when the publication is admitted, and most cases do arise on demurrer, why should a jury be required? Why could not the court grant an injunction just as it does in certain cases of trespass,¹¹ disturbances of easements¹² or nuisances.¹³ Professor Pound¹⁴ after pointing out the effort made in the early English cases to allow an injunction, shows that the practice first arose of allowing an injunction in cases where the libel was repeated or the publication continued after a jury had found the matter

Wall (U. S.) 243. (4) Our Constitution probably does not guarantee the liberty to intimidate by speech or writing, but the decisions are not very consistent. In *State v. McCabe*, (1896) 136 Mo. 450, 37 S. W. 123, a statute was upheld which made it a misdemeanor to compel a debtor to pay a just debt by threatening to publish his name as a bad debtor—even tho it were true. In *Marx, etc., Co. v. Watson*, (1902) 168 Mo. 133, 67 S. W. 391, a similar injury to credit was involved altho perhaps not so directly, and an injunction was refused. Assuming that the latter court would have followed the first case if this had been a prosecution under the statute, why would it not grant an injunction—the injury appearing to be an irreparable one? Even tho an act is a misdemeanor equity may enjoin its commission if the remedy at law is inadequate for altho the fact that a particular act is a crime or misdemeanor is no basis for relief in equity, it is also no basis for denying relief.

7. (1895) 131 Mo. 212, 32 S. W. 1109.

8. *Cf. Lohse, etc., Co. v. Fuelle* (1908) 215 Mo. 421, 114 S. W. 997.

9. *Spinning Hed Co. v. Riley* (1868) L. R. 6. Eq. 651; *Seattle Brewing and Malting Co. v. Hansen* (1905) 144 Fed. 1011 (notices incidental to a boycott); *Coeur D'Alene Co. v. Miners Union* (1892) 51 Fed. 260, 19 L. R. A. 382; *Sherry v. Perkins* (1888) 147 Mass. 212; *Jordahl v. Hayde* (1905) 1 Cal. App. 696, 82 Pac. 1079; *Emack v. Kane* (1888) 34 Fed. 46.

10. *Heller v. Pulitzer Pub. Co.* (1899) 153 Mo. 205, 54, S. W. 457.

11. *Miller v. Lynch* (1892) 149 Pa. St. 460, 24 Atl. 80; *Hart v. Leonard* (1886) 42 N. J. Eq. 416, 7 Atl. 865.

12. *Seiby v. Nettleford* (1872) 9 Ch. App. 111; *Newell v. Lass* (1892) 142 Ill. 104.

13. *Hayden v. Tucker* (1866) 37 Mo. 215; *Carpenter v. Gresham* (1875) 59 Mo. 247; *Turner v. Stewart* (1883) 78 Mo. 480.

14. 24 H. L. R. 665.

libelous.¹⁵ *Flint v. Hutchinson Smoke Burner Co.*,¹⁶ has a *dictum* to the same effect. Later it came to be held that if the libel was clearly established, an injunction would be granted without plaintiff going to a court of law. He says further that the Common Law Procedure Act (1873) affords very slight foundation for this result, and that the courts strained a point to grant equitable relief. Today the English courts will grant an interlocutory injunction against a libel if it is clearly shown to be one,¹⁷ exactly as in the case of any other tort. The American cases have not gone so far, and have only enjoined the publication as incidental to an unlawful boycott or unlawful intimidation of employees.

Probably in Missouri the modern English rule will only be reached by legislation. If the *dictum* in *Flint v. Hutchinson Smoke Burner Co.*, be adopted, and an injunction granted after verdict, it will afford more adequate relief, but when the facts are admitted and the case is reduced to a matter of pleadings, why should not one's business or reputation be protected from an insolvent, malicious defamer without the delay of a jury trial?

J. P. HANNIGAN

RAPE ON INSANE WOMAN—DEFENDANT'S KNOWLEDGE OF INSANITY. *State v. Helderle*.¹—The defendant was tried and convicted for rape. The woman was eighteen years of age and of unsound mind at the time. It was shown that she had given her actual consent and that defendant did not know of her mental condition, nor had he knowledge of any facts from which his knowledge of her insanity could be inferred. Upon this state of facts the Supreme Court held defendant's lack of knowledge a defense, three judges dissenting. FARRIS, J., for the majority based his opinion on the authority of previous Missouri decisions² and on the theory that a conviction under such circumstances would destroy the presumption of innocence and establish instead a presumption of guilt merely upon proof of the woman's insanity. WOODSON, C. J., in a concurring opinion held that as defendant had no felonious intent he was not guilty. REVELLE, J., dissenting, contended that, owing to the woman's insanity there was no consent sufficient in law to prevent the act from being rape.

15. *Saxby v. Easterbrook* (1878) 3 C. P. D. 339; *Halsey v. Brotherhood* (1880) 15 Ch. D. 514, 19 Ch. D. 386.

16. (1892) 110 Mo. 492, 19 S. W. 804.

17. *Liverpool Ass'n v. Smith* (1887) 37 Ch. D. 170; *Bonnard v. Perryman* (1891) 2 Ch. 269.

18. *Collard v. Marshall* (1892) 1 Ch. 571. For the present practice, see *James v. James* (1872) 13 Eq. 421; *Thorley's Cattle Food Co. v. Massam* (1880) 14 Ch. D. 763; *Thomas v. Williams* (1880) 14 Ch. D. 864; *Herman Loog v. Bean* (1884) 26 Ch. D. 306; *Hayward v. Hayward* (1886) 34 Ch. D. 198; *Walter v. Ashton* (1902) 2 Ch. 282.

1. (1916) 186 S. W. 696.

2. *State v. Cunningham* (1889) 100 Mo. 382, 12 S. W. 376; *State v. Warren* (1910) 232 Mo. 185, 134 S. W. 376; *State v. Schlichter* (1913) 263 Mo. 274, 173 S. W. 1072.

The crime of rape is defined in the statute,³ so far as it affects the case under consideration, as the forcible ravishment of any woman of the age of 14 or upward. Absence of consent is a necessary element of the crime under this part of the statutory definition.⁴ Under certain conditions unlawful sexual intercourse may be rape even tho the woman consents to the act. This is true in cases where she is deemed incapable, either in law or in fact, of giving a valid consent. If she is below the statutory age her consent is immaterial.⁵ If she is under the influence of drugs⁶ or intoxicants⁷ she may be incapacitated in fact. An insane woman is deemed by the law incapable of consenting and for that reason intercourse with her may be rape if the defendant knew of her insanity, even if no force is used and she does not resist.⁸

In the case of rape upon a woman under the age of consent a bona fide and reasonable belief that the girl was above such age is no defense.⁹ In such cases, however, this result seems to be required by the terms of the statute and the question presented by *State v. Helderle* is whether a similar doctrine can be applied as a matter of common law in cases where defendant has intercourse with an insane woman not knowing of her insanity. The result of the Missouri decisions on the question, as above cited, is that if defendant had at the time of intercourse no knowledge and no means of knowledge of the insanity he cannot be convicted of rape if the woman appears to consent. Authorities are not numerous but in *People v. Griffin*¹⁰ which was an indictment under a California statute in which rape was defined as illicit sexual intercourse with a female of unsound mind, thus differing materially from the Missouri statute, a conviction was sustained. The court held that the defendant acted at his peril and his ignorance was no defense. This conclusion seems to have been required by the terms of the statute.

The principal argument against a conviction in those cases in which defendant had no knowledge of the insanity is that he labored under a reasonable mistake and had not therefore the necessary *mens rea* to make him guilty of a crime.¹¹ However it is not necessary in Missouri that a specific intent to violate the law or to do a particular act must invariably be present in order that a crime can be committed. The man who shoots at A with intent to kill him and accidentally kills

3. Revised Statutes 1909, § 4471.

4. *State v. Cunningham*, *supra*; *State v. Murphy* (1893) 118 Mo. 7, 25 S. W. 95.

5. *State v. Day* (1905) 188 Mo. 359, 87 S. W. 465.

6. *Harlan v. People* (1904) 32 Colo. 397; *State v. Green* (1860) 2 Ohio Dec. (Rep't.) 255.

7. *State v. Hairston* (1897) 121 N. C. 579; *Territory v. Edle* (1892) 6 N. M. 555; *Regina v. Camplin* (1845) 1 Cox C. C. 220.

8. *State v. Cunningham* (1889) 100 Mo. 382, 12 S. W. 376; *State v. Williams* (1899) 149 Mo. 496, 51 S. W. 88.

9. *State v. Houz* (1891) 109 Mo. 661, 19 S. W. 35; *State v. Basket* (1892) 111 Mo. 272, 19 S. W. 1097; *State v. Johnson* (1893) 115 Mo. 480, 22 S. W. 463.

10. (Cal., 1897) 49 Pac. 711.

11. *State v. Schlichter* (1913) 263 Mo. 274, 173 S. W. 1072.

B is guilty of the murder of B.¹² One who brandishes a weapon in public, with no intent to injure, and in doing so kills another is guilty of manslaughter because he had the intent to do a dangerous act.¹³

In the application of this doctrine should a difference be made between cases where the facts show an intent to commit an indictable act and where the intent is to do an act not indictable yet recognized as morally wrong or detrimental to society? If the act to the accomplishment of which the defendant's intention is immediately directed is morally wrong and anti-social, regardless of its prohibition by law, there is at least a *dictum* in Missouri to the effect that he takes his chances of the criminality of consequences he did not contemplate.¹⁴

A single act of fornication or of illicit sexual intercourse between unmarried persons is not indictable in Missouri. It is however universally recognized as an act highly immoral in its very nature and against the best interests of society. The defendant here intended the commission of this immoral act and it is submitted that tho he was ignorant of the woman's insanity he acted at his peril and if in the course of the commission of such an act he actually has intercourse with a woman or because of her insanity is not capable of giving an adequate consent, his ignorance of her mental condition should be no defense.

Altho it is doubtless possible to draw a distinction between the cases involving questions of the age of consent and insanity cases, inasmuch as the former cases seem to depend upon the terms of the statute, it will be noticed that the courts not infrequently base their conclusion that knowledge of the woman's age is immaterial on reasoning which could be readily applied in such cases as *State v. Helderle*. Such convictions are almost invariably justified on the ground that defendant had the intent to do an act which was wrong in its very nature tho he had no intent to do an act which was indictable. The same process of reasoning might well lead to a conclusion different from that reached by the majority of the court in *State v. Helderle*.

PAUL G. KOONTZ

CONTRACTS—WHEN IS A LIFE INSURANCE CONTRACT COMPLETE?

*Tainter v. Central States Life Insurance Co.*¹—The plaintiff's husband made an application for life insurance to the defendant's soliciting agent and gave him as payment for the first premium his note due in six months. The applicant was subsequently examined by the defendant's local physician who forwarded his report to the home office. A day later the applicant was killed. The defendant learning of this, refused to issue a policy and wired its

12. *State v. Montgomery* (1886) 91 Mo. 52, 3 S. W. 379.

13. *State v. Emery* (1883) 78 Mo. 77.

14. *State v. Houz* (1891) 109 Mo. 654, 661, 19 S. W. 35.

1. (Mo., 1916) 185 S. W. 1185.

agent to return the note. Two months later the plaintiff made a demand for a policy, and upon defendant's refusal to issue one asked for the note. This was also refused, the secretary stating that it was in the agent's possession. After about eight months the plaintiff tendered the agent the amount due on the note but he refused to accept it, and failed to offer to return the note. Afterwards an action was brought. The company procured the note and offered it in court for cancellation. A judgment for the defendant was affirmed by the Kansas City Court of Appeals.

An application for life insurance is to be regarded only as an offer.² To complete the contract an acceptance by the insurer is necessary, and as there are always certain express or implied conditions performance of these by the insured is also necessary before the contract is deemed operative. The usual conditions are the issuance of a policy, the delivery to the insured and the acceptance thereof by him and payment of the first premium, while in good health. The validity of such conditions precedent to the formation of the contract has been sustained by the courts.³ Since these conditions are for the benefit of the insurer he may waive them. When the waiver arises by implication courts have often called it an estoppel, and in the cases we find the two used interchangeably.⁴

In the principal case there was no acceptance in fact of the application, and the theory upon which the action was brought, as viewed by the appellate court, was that the insurance company had impliedly waived the requirements necessary to an acceptance, viz., the approval of the application and the issuance of a policy.

The giving of the note as payment for the first premium before the application had been forwarded to, and acted upon by, the insurer, in no way bound the company as this is the customary proceeding. The giving of the note was subject to the agreement, implied if not express, that it was to be returned if the company did not accept the offer made in the application.

Counsel for the plaintiff sought to bring the principal case within the decision in *Rhodus v. Kansas City Life Insurance Co.*⁵ The application in that case contained the provision that the contract was not to be deemed operative until the policy had been delivered to, and accepted by, the applicant while in good health. Previous to the issuance of a policy the applicant died, but after his death the defendant's agent collected the sum due on a note given by the deceased at the time the application was made. After deducting his commission the agent forwarded the balance to the defendant who, after gaining knowledge

2. *McCracken v. Travelers' Ins. Co.* (Ore., 1916) 156 Pac. 640.

3. *Kohen v. Mutual Reserve Fund Ins. Co.* (1888) 28 Fed. 705; *Cravens v. New York Life Ins. Co.* (1898) 148 Mo. 583, 50 S. W. 519.

4. *Central Life Ins. Co. v. Roberts* (Ky., 1916) 176 S. W. 1139, citing *Kiern v. Dutchess County Mutual Ins. Co.*, (1896) 50 N. Y. 190, and *Globe Mutual Life Ins. Co. v. Wolff*, (1877) 95 U. S. 326.

5. (1911) 156 Mo. App. 281, 137 S. W. 907.

of all the facts, failed to tender a return of the money even after suit was filed. The court of appeals held that the retention of the premium was a waiver of the conditions in the application. The language of the opinion indicates that the defendant became liable by virtue of its ratification of the agent's act in collecting the note with knowledge of the applicant's death. The court says that the defendant "adopted the agent's acts as consummating a contract without a formal approval of the application on the issuance of a policy."

As regards the power of a soliciting agent of life insurance to waive conditions, or consummate contracts, the authorities are not uniform. The better rule seems to be that he is without such power.⁶ Two recent cases have taken opposite views.⁷ The Supreme Court of the United States has inclined to the one limiting the agent's authority.⁸ The Missouri courts take the position that such an agent may not waive conditions. In *Bell v. Missouri State Life Ins. Co.*,⁹ the agent delivered the policy with knowledge that the applicant was not in good health. The premium was sent to the defendant who learned in September that the condition had been violated. The offer to return the premium was not made until the following January. In affirming the judgment for the amount of the policy in the plaintiff's favor the court conceded the fact that the agent had not the power to waive the condition, and based its decision on the ground of a ratification of the agent's act by the defendant, evinced by its failure to tender return of the premium for a period of four months.

In an earlier case, *Norman v. United Commercial Travellers*,¹⁰ the failure of the insurer to refund the premium was termed "conclusive evidence" of an acceptance where that failure had continued after he had gained knowledge of all the facts. But in that case the premium had been sent to the defendant's home office, and there retained. Two years after this decision the Springfield Court of Appeals in *Porter v. Loyal Americans*¹¹ did not deem the failure of the agent to return the premium "conclusive evidence" of an acceptance by the company where the company had expressly directed a return and where it at all times denied liability to the plaintiff.

If the agent in the principal case had no authority to complete the contract by retaining the premium note the company became liable, if at all, either by virtue of a ratification of his act, or because it is

6. See Richards, Insurance Law (3d ed.) p. 198.

7. The agent with authority to solicit, accept premiums, and deliver policies has authority to waive condition of delivery to insured while in good health. *McClelland v. Mutual Life Ins. Co.* (1916) 217 N. Y. 336, 111 N. E. 1062. *Contra, American Bankers Ins. Co. v. Thomas* (Ore., 1916) 154 Pac. 44.

8. *Northern Assurance Co. v. Grandview Bldg. Ass'n.* (1901) 183 U. S. 308.

9. (1912) 166 Mo. App. 390, 149 S. W. 33.

10. (1912) 163 Mo. App. 175, 145 S. W. 853.

11. (1914) 180 Mo. App. 538, 167 S. W. 578.

estopped from denying the existence of a contract thru his failure to tender return of the note.

The defendant did nothing which may be construed as an adoption of the agent's act. It did not adopt by retention as the note never came into its possession. Its express direction to the agent, also, negatives the idea of adoption.

The defendant does not seem to be estopped as it expressly took the position that no contract existed. The plaintiff had knowledge of this attitude at the outset. As stated in *Porter v. Loyal Americans*, at p. 546, "no one was lulled or lured into nonaction by the defendant's conduct." The plaintiff cannot be heard to say that she relied on the agent's failure to return the premium as leading her to believe the contract was in existence because the principal had previously expressly repudiated any contractual relation. Assuming even that the agent's knowledge of the non return of the premium was imputable to the defendant the situation as between it and the plaintiff remains unchanged. The defendant still denies the existence of a contract altho it knows that the agent, contrary to his orders, has failed to refund the premium. The defendant remains liable for the premium because it was received by its agent in an authorized capacity, but as the defendant has unequivocally informed the plaintiff that no contract has arisen the plaintiff may not rely on the agent's conduct, and urge that the defendant is estopped.¹²

The Missouri courts, it is submitted, have taken a desirable course in restricting the doctrine of implied waiver, or so-called estoppel, to cases in which the defendant's own conduct has been clear as to the recognition of a contract of insurance. From this point of view the principal case has been properly distinguished from *Rhodus v. Kansas City Life Ins. Co.*¹³

S. H. LIBERMAN

ASSAULT AND BATTERY—DEFENSE OF A THIRD PERSON—RIGHT OF A PARENT TO DEFEND A CHILD. *State v. McNall*.¹—Two boys, A and B, engaged in a fight. A was the son of the defendant. C, the brother of B, a boy fifteen years old, interfered and attempted to hold A so that B could beat him. When the defendant saw the added peril in which his son was placed, he interfered and pushed C away and struck at him, for which interference defendant was convicted of assault and battery. There was substantial evidence that defendant used no more force than was reasonably necessary to protect his son. The court below declined to instruct the jury as to the right of the defendant to protect his son. The St. Louis Court of Appeals, in reversing the case, held that the "defendant had the same right to act in defense of his

12. *Conn. Mutual Life Ins. Co. v. Rudolph* (1876) 45 Tex. 454.

13. (1911) 156 Mo. App. 281, 137 S. W. 907.

1. (1916) 182 S. W. 1081.

son in the circumstances of the case that the son engaged in the affray had to act in defense of himself."

The question involved in this case is as to the existence of a right in the father to act in defense of his son. *State v. Foley*² lays down the rule flatly, that "whatever one may do for himself he may do for another." This statement does not accurately represent the law of Missouri for it fails to distinguish between the right of one to defend another standing in a family relation and the right to defend a stranger. Neither does it attempt to set apart those cases in which the interference of the third party is for the purpose of defending the one assailed from an apparent battery not involving a felonious attempt, from those cases in which the intervention of the third person is to prevent the commission of a felony, or to protect the assailed from what reasonably appears to be a felonious attack.

A stranger may intervene to preserve the peace where there is nothing but a simple assault and battery but he cannot actively defend either the assailant or the one assailed.³ In cases where there is reasonable apprehension that a felony is about to be committed he may justify an intervention on the grounds that he did it in "lawfully keeping and preserving the peace."⁴ Altho the right of the stranger to intervene is based on the same reason in each case, yet in the latter case, because of the serious nature of the attack, the law generally permits him to enter actively in the lawful defense of the one attacked in the same right that the one attacked has to defend himself and to the same extent. Substantially, then, a stranger in such cases has the same right to defend another that the other has to defend himself,⁵ while in cases of assault and battery not involving a felonious attempt, he may intervene only to preserve the peace. There is some authority to the effect that a stranger in defending against a felonious attack must proceed with greater caution than one standing in a mutual family relation,⁶ but the cases in Missouri do not seem to have followed this distinction.

One may defend husband,⁷ wife,⁸ parent,⁹ child,¹⁰ master, or servant,¹¹ with the same right that the other would have to defend

2. (1882) 12 Mo. App. 431.

3. *Commonwealth v. Cooley* (1856) 72 Mass. 350; *Spicer v. People* (1882) 11 Ill. App. 294; *Morrison v. Commonwealth* (1903) 24 Ky. Law Rep. 2493, 74 S. W. 277; Wharton, *Crim. Law*, § 325; Kelley, *Crim. Law and Practice*, § 585; 3 Blackstone, *Commentaries* *3.

4. Revised Statutes 1909, § 4451.

5. *State v. Foley* (1882) 12 Mo. App. 431; *State v. Totman* (1899) 80 Mo. App. 125; *Brouster v. Fox* (1906) 117 Mo. App. 711, 93 S. W. 318.

6. *State v. Harper* (1899) 149 Mo. 514, 51 S. W. 89; *Conner v. State* (1883) 4 Yerg. (Tenn.) 137; Kelley, *Criminal Law and Practice*, § 523.

7. *Cokely v. State* (1857) 4 Iowa 477.

8. *State v. Bullock* (1889) 91 N. C. 614.

9. *State v. Linney* (1873) 52 Mo. 40; *Commonwealth v. Malone* (1873) 114 Mass. 295; *State v. Herdina* (1878) 25 Minn. 161; *Smith v. State* (1911) 61 Tex. Crim. App. 349; *Cox v. State* (1911) 99 Ark. 90.

10. *State v. Harper* (1899) 149 Mo. 514, 51 S. W. 89; *State v. Hickam* (1888) 95 Mo. 322, 8 S. W. 252; *State v. Johnson* (1876) 75 N. C. 174.

11. *Orton v. State* (1853) 4 Greene (Iowa) 140.

himself regardless of whether the assault is felonious or not. The reasons given are that one owes a duty to defend those standing in such relations; that one has the same interest in defending them as he has in defending himself and that the basis of the active protection and defense of such is just as instinctive as in the case of self-preservation.

The right of one to defend another standing in a mutual relation is generally held to be no greater than the right that other has to defend himself.¹² In *State v. Melton*¹³ the court held that an instruction to the effect that the defendant had no greater right to defend his brother than his brother had to defend himself was correct. In this case the evidence indicated that the defendant knew his brother was the aggressor. *State v. Harper*¹⁴ holds that a son is justified in killing his father's aggressor if there is reasonable apprehension of an apparent felony, regardless of whether the father was the aggressor or had entered the fight voluntarily, provided that the father did not enter the affray with a felonious intent, and, further, that the son did not know who began the assault. *State v. Harper* may be distinguished from *State v. Melton* in that, in the latter case, there was substantial evidence that the defendant knew of his brother's fault; and that brothers do not stand in the category of mutual relations according to the common law. *State v. Harper* is difficult to justify and is opposed to the overwhelming weight of authority in other jurisdictions.

In *State v. Harper* the defendant interfered to prevent a felony or the infliction of serious bodily injury upon his father, and in *State v. Hickam*,¹⁵ which was an indictment for assault with intent to kill, it was held that the defendant, coming upon the scene without knowing who was the aggressor, had the right to defend his mother, sister and servant against what was probably no more than a simple assault and battery. The defendant in *State v. McNall* interfered to protect his son from an impending battery. It appears from the facts stated that the prosecuting witness was the aggressor, and that the doctrine of *State v. Hickam* is not involved. The case is sound and is thoroughly in accord with previous decisions in Missouri and the great weight of authority elsewhere.

ROSCOE E. HARPER

PERPETUITIES—EFFECT OF REMOTENESS. *Riley v. Jaeger*.^{1—}
A testator devised all of his property to his eight children "intending each to have a full and equal share," and providing for a deduction

12. *State v. Brittain* (1889) 89 N. C. 481; *State v. Herdina* (1878) 25 Minn. 161; *Crowder v. State* (1881) 8 Lea (Tenn.) 669. See *State v. Melton* (1890) 102 Mo. 683, 15 S. W. 139; *Waddell v. State* (1877) 1 Tex. Crim. App. 720.

13. 102 Mo. 683, 15 S. W. 139.

14. (1899) 149 Mo. 514, 51 S. W. 89. Accord, *State v. Linney* (1873) 52 Mo. 40; *State v. Hickam* (1888) 95 Mo. 322, 8 S. W. 252. See *State v. Turner* (1914) 246 Mo. 593, 152 S. W. 313.

15. (1888) 95 Mo. 322, 8 S. W. 252.

1. (1916) 189 S. W. 1168.

of advancements. He stipulated that real estate which had been advanced to four of the children should be held by them for life, without power of alienation, with remainder as to the share of each to his descendant. He further declared "that in event of the death of any of my said eight children without issue, or in case the direct descendants of any one of such children aforesaid shall all die, that in either such case the share of such child shall revert to the survivor of the eight direct legatees named and to the descendants of such as may be deceased—said shares when so reverting to be held by the several recipients subject to the above restriction and limitations, it being my desire that all my property remain with my children or their descendants and in no event become the property of strangers to my blood." He then provided that all advancements which had been made, or which should be made, should be held by his children "free from all debts contracted or to be contracted by them or either of them; in order the more fully to secure the same to them and their descendants."

In an action to quiet title, the circuit court held this will to be void because of the rule against perpetuities. The Supreme Court in affirming this judgment relies upon *Lockridge v. Mace*² and *Sheppard v. Fisher*.³ The opinion is confined to a discussion of the remoteness of the attempted gift. No effort was made to avoid the application of the rule against perpetuities by a strained construction of the will. The decision therefore confirms the established rule that the construction of any limitation must be made wholly independently of the rule against remoteness.⁴

The court showed no disposition to inquire into the extent of the invalidity which was occasioned by a remoteness of a part of the testator's scheme of disposition. In *Lockridge v. Mace* a devise to the testator's wife for life, remainder to his children for life, remainder to his grandchildren for life, remainder to his great-grandchildren in fee, was held void because it was thought to constitute "but one disposition of the 'home farm,'" and the property passed as intestate property. In *Sheppard v. Fisher*, there was a devise to the testator's daughter Mary for life "and at her death to her bodily heirs, if the said bodily heirs have bodily issue, forever, but should the said bodily heirs of the said Mary die without issue" then to the testator's heirs; this devise was held to "constitute but one general disposition of all the lands and tenements of which the testator died seized," and the whole was therefore held to be void. The question at once arises whether the devise in *Riley v. Jaeger* can be said to have constituted but one disposition of the testator's property, so as to

2. (1891) 109 Mo. 162, 18 S. W. 1145.

3. (1907) 206 Mo. 208, 103 S. W. 989.

4. 8 Law Series, Missouri Bulletin, p. 14; Gray, Perpetuities, (3d ed.) § 629; *Dime Savings & Trust Co. v. Watson* (1912) 254 Ill. 419. But if two constructions are equally permissible, that should be preferred which avoids remoteness. *Allen v. Almy* (1913) 87 Conn. 517.

necessitate the failure of the devise *in toto* because the gift over on the death of the children's descendant.

The writer has insisted that the rule of *Lockridge v. Shepperd v. Fisher*, invalidating as it does limitations of property which have in them no intrinsic taint, is narrowly limited.⁵ These decisions go further than previous states, where the tendency is to uphold as many conditions of a will as are not in themselves remote, unless it is shown that the testator would have desired all of his gift could not take effect. Thus *Lockridge v. Mace* has been being "somewhat out of line with the other courts." Gray in commenting on the case said,⁷ "It is considered that the learned court of Missouri will come into line with the others. Even if the rule of *Lockridge v. Mace* and *Shepperd v. Fisher* is a settled rule of the law of property so that *stare decisis* it can not now be overthrown, still it is a rule which ought not to be extended, and for which careful analysis should be made of every remote limitation. If this position is sound, it is the Supreme Court in *Riley v. Jaeger* did not take that the remote limitations were so bound up with the main gift that the testator had attempted a general scheme of the peculiar Missouri rule as to the effect of remote limitations to apply. BLAIR, J., in his opinion, merely stated that the rule was clearly violative of the rule against perpetuities," and the holding of the court below that the will was void because it was in the future the existence of one void condition in a will is going to be held to be sufficient to invalidate the whole. Surely our law should not be developed toward such a result as in *Riley v. Jaeger*, wills are declared *wholly* void because of application of the rule against perpetuities to some remote limitation. It will not be long until such an extreme position is reached for.

The question then remains whether in *Riley v. Jaeger* the remote limitations were so connected with other limitations as to be a "general plan of disposition" within the meaning of the rule as used in *Shepperd v. Fisher*. The testator gave the gift over to his eight children, and since there was no gift over to life estates, they clearly took a fee simple. If a remote limitation was made in *substitution* for the gift over, it was referred on the testator's children, and it would have been a gift by way of executory devise. In *Van Pretres v. Cole*,⁸

5. See the writer's article on "The Rule Against Perpetuities in Missouri" 3 Law Series, Missouri Bulletin, pp. 22-28.

6. 20 L. R. A. 509.

7. Gray, Perpetuities (3d ed.) §249a.

8. (1880) 73 Mo. 39.

devise of a fee simple, with an executory devise over to a residuary legatee who was incapable of taking under the law of mortmain; the court held that the first devisee took the whole estate free from the void executory devise over. It is difficult to see why a devisee should not continue to hold even tho the executory devise be void for remoteness, inasmuch as the first devisee in such cases as *Van Pretres v. Cole* continues to hold in spite of the invalidity of the executory devise on account of the incapacity of the devisee. The situation is not one where the court should resort to a weighing of the various elements of the testator's intention, for the purpose of conjecturing whether he would have desired any of his intention to be validated if all can not be validated. But on the facts in *Riley v. Jaeger*, it is quite clear that the testator desired his property to go to his children, and there is nothing to indicate that he would have desired all of his devise to fail if he had been informed that the gift over on the children's descendants' death without children was void.

The devise in *Riley v. Jaeger* also contained void restrictions on alienation. Would it be contended that because of the invalidity of these provisions of restraint, the devise itself is void? It has always been held that the invalidity of a restraint on alienation simply frees the devise of the restraint. It might have been held in *Riley v. Jaeger* that the invalidity of the executory devise simply freed the estate given to the children of the executory devise.

As an authority, this case is to be distinguished on the ground that the result of the decision is not wholly at variance with the result which would have been reached if the court had held that the rule of *Lockridge v. Mace* and *Shepperd v. Fisher* did not apply. As the case was decided, the property passed as intestate property, and all of the testator's eight children therefore shared in it. If the court had refused to apply the rule of *Lockridge v. Mace* and *Shepperd v. Fisher*, all of the property would have passed to the same children, except that they would have taken by purchase instead of by descent and their portions would have been subject to the testator's provisions for the deduction of advancements. Furthermore as to certain advancements, certain of the children would have taken only life estates with remainders to their descendants. Undoubtedly the court would be influenced by the circumstances that the invalidity of the whole will would result in conferring the property upon persons other than those who are named in the will itself as devisees. Even if in such a case as *Riley v. Jaeger* there is a general plan of disposition which must fail *in toto* as a result of the invalidity of a part, it may be expected that the court would hesitate to find such a general plan if as a result the property would pass to persons in no wise named in the will itself.

It is to be hoped that when the question again arises the court will show some disposition to limit the rule of *Lockridge v. Mace*

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and *Shepperd v. Fisher*; or failing that, at least out that there is a basis for the application of such it can not be safely assumed that any part of a will part is void for remoteness.

M.

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E. W. HINTON

NOTES ON RECENT MISSOURI CASES



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Some Problems in Hearsay and Relevancy In Missouri

There is no rule better known than that hearsay evidence is generally not admissible. It is equally true, tho not so widely known, that there are a large number of specific exceptions to this general rule of exclusion. Hearsay has been so long under the ban that the profession not uncommonly thinks of it as not being evidence at all, rather than as a kind of evidence generally excluded for reasons of policy connected with the jury trial.

This notion is responsible for a good deal of confusion in dealing with the exceptions under which hearsay is received. Instead of frankly dealing with the problem on the basis of a recognized exception to the hearsay rule, there is a constant tendency to conclude that because certain evidence having all the earmarks of hearsay is actually received, it can not be hearsay, and to distinguish it from hearsay by such phrases as "verbal acts" and "*res gestae*."

Under this confused process courts frequently seem to think that it is sufficient to determine that given matter is hearsay without considering the exceptions, thus unduly limiting the legitimate use of hearsay. In other fields the "verbal act" phrase has been invoked to admit hearsay that can not be classified under any known exception.

It must be remembered that the term "*res gestae*" is used in many different senses, and that to settle that spoken or written words are a part of the *res gestae* does not in the least determine whether we are dealing with hearsay or not. For example, A calls B a liar who promptly knocks him down. These words are relevant and admissible as explaining the cause of the assault. To call them a part of the *res gestae* means no more than that, for there is obviously no question of hearsay involved. We are not trying to prove that B is a liar, but merely what provoked him to make the assault. If in the progress of the fight A should

cry out, "He is choking me," this would also be admitted, and probably with the explanation that it was a part of the *res gestae*. Here the court is admitting hearsay because we are trying to prove that B did choke A by A's unsworn, un-crossexamined assertion to that effect. This hearsay assertion is receivable because there is an exception to the hearsay rule covering that sort of an assertion when made under the conditions supposed. The same confusion is involved in the "verbal act" phrase. The speaking of any words is of course an act, involving mental and physical action—a verbal act. Since all speaking is a verbal act it is not very helpful to use such a term to explain two very different situations, viz., the admission of words where no question of hearsay is involved, and the admission of words amounting to an assertion under some exception to the hearsay rule.

For example, if it were important to prove that A was unfriendly to B, no one would doubt that proof that A professed friendship for B, and at the same time circulated damaging reports about him which he knew to be false, would be good evidence for the purpose. Here no problem of hearsay is involved. We are not taking A's assertions as true, but are arguing from the falsity and inconsistency to the probable motives or feelings which prompted them. If, however, A used words which amounted to an assertion of his hate for B, we are immediately confronted with the hearsay rule, and hence must find an appropriate exception. Nothing but confusion is gained to call this a verbal act, for that will not help to differentiate this particular piece of hearsay from the general mass of inadmissible hearsay.

Another source of confusion is the frequent failure to separate certain problems of relevancy from the hearsay rule and its exceptions. To illustrate: a party may seek to prove fact X as tending to establish fact Y, and may offer to prove X by hearsay claimed to come under a well settled exception. Here are two distinct questions: is X sufficiently relevant to Y to be proved at all, and if so, is the offered hearsay a permissible means of proving X? Yet it is not uncommon to find these two questions discussed to the confusion of both, as if the question were simply whether hearsay was admissible to prove Y.

With this brief introduction it is now proposed to deal with the somewhat confused and inconsistent treatment of similar problems in hearsay and relevancy by the courts of Missouri: first, on the issue of self-defence by threats by the deceased as tending to show that he was the aggressor; second, the proof of threats of suicide by the deceased as tending to disprove the charge of murder; third, threats by a third person as tending to show that the third person committed the crime rather than the defendant.

The argument involved in each situation is this: A threatened to assault B, and therefore he probably did so. A fight took place between A and B, and it is probable that A was carrying out his intention to kill himself, and therefore he probably intended to kill B. S died from wounds which he might have inflicted, therefore it is probable that he carried out his intention. T intended to burn J's house, and therefore he probably did so; the house was burned when T might have done so, therefore it is probable that he carried out his intention.

Is such an argument permissible in a court of law? It cannot be claimed that the known intention of X, as a fact, results to pass, whether innocent or harmful, without further proof, as a basis *per se* for a conclusion that he carried out his intention. Experience shows no such uniform connection between intention and conduct. But in connection with other facts, such as opportunity and ability to produce the result, intention is an important factor in determining the author.

As applied to a defendant, it was never doubted that intention was a relevant and important fact, in determining whether he did a given act. And if a defendant's intention is shown by his probable conduct, the intention of a third person under similar conditions must be equally relevant as bearing on probable conduct, unless we are to have one system of law for a defendant, and a totally different one for third persons. It is argued that either a defendant or a third person carrying out his intention, such intention must, of course, have existed at the time of the act sought to be established.

this is impossible to prove directly; from the nature of a situation we can only argue that a known prior intention continued to the time in question. Within what limits this is permissible can not be defined, because no two cases are precisely alike. An intention to commit a simple assault and battery because of some slight provocation might not continue an hour; an intention to kill another because of a real or fancied grievance might well continue for months. As against defendants the original rule appeared to be that the intention must be shown to have existed close enough in point of time to warrant a reasonable inference of continuance under all the circumstances. Certainly no stricter rule should be applied to the case of a third party. And in fact there is a good deal to be said in favor of applying a more liberal time rule in the latter case. In a criminal case a very high degree of certainty is necessary to convict, and therefore prior intention may well be excluded unless close enough in point of time under the circumstances to raise a strong probability of continuance.

A defendant is entitled to an acquittal if there is a reasonable doubt of guilt, and hence proof tending to show the commission of the act by a third person might well be sufficient to raise a reasonable doubt, tho it would not have been sufficient to convict such third person if he had been on trial. This view does not appear to have been discussed in any of the cases, and in some of them, because of a confused treatment of the *res gestae* notion, a stricter rule seems to have been applied to the intention of a third person, *e. g. Foster v. Shepard*.¹

Assuming that the prior intention may be shown, there is no difficulty about the means of proof in the case of a defendant; because it is universally recognized that whatever he may have said, whether circumstantially evidencing his intention, or directly asserting it, is receivable as an admission. In the case of a third person, declarations of intention are of course hearsay, *i. e.* unsworn, un-crossexamined assertions of a fact (intention) used to prove the existence of the fact asserted, and must therefore come in under some exception to the hearsay rule, if they are to be admitted. The *res gestae* phrase has been most frequently

1. (1913) 258 Ill. 164.

invoked to the utter confusion of the subject, because it suggests declarations connected with, and accompanying an act, so as to be a part of the thing done.²

In fact there is a much broader exception which ought to be well understood at this time, and that is that whenever a state of mind is a relevant fact, contemporaneous assertions of such state of mind are receivable to prove it. In *Doe v. Palmer*,³ the rule as applied to the intention of a testator was thus stated by Lord Chief Justice Campbell: "In all cases where there is any imputation of fraud in the making of the will, the declarations of the testator are admitted respecting his dislike or affection for his relations, or those who appear in the will to be the objects of his bounty, and respecting his intentions either to benefit them or to pass them by in the disposition of his property."

And in *Sugden v. St. Leonards*,⁴ also a will case involving the intention of the testator as a relevant fact, Lord Justice Mellish thus stated the rule and the reason: "Whenever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which we can find out what his intentions were."

In the United States the exception was most clearly recognized by the Supreme Court of the United States in *Mutual Life Insurance Company v. Hillmon*.⁵ The issue was as to the identity of a dead body; a man had been killed in an accident; the plaintiff claimed that the dead man was the insured, Hillmon; the defendant claimed that the dead man was one Walter, a stranger; in connection with other evidence tending to identify Walter as the dead man, the defendant, in order to show the probability of Walter's being present at the time, offered letters written by him several weeks before expressing his intention of going to that part of the country with Hillmon. The letters were rejected by the trial judge on the hearsay objection. In holding that the

2. For an extreme application of this notion, see *Greenacre v. Fildy* (Ill. 1916) 114 N. E. 536.

3. (1851) 16 Q. B. 747.

4. (1876) 1 Prob. Div. 154.

5. (1892) 145 U. S. 285.

letters should have been admitted, Mr. Justice Gray said: "But upon another ground suggested they (the letters) should have been admitted. A man's state of mind or feelings can only be manifested to others by countenance, attitude or gesture, or by sounds or words, spoken or written. The nature of the fact is the same, and evidence of its proper tokens is equally competent to prove it, whether expressed by aspect or conduct, by voice or pen. When the intention to be proved is important only as qualifying an act, its connection with the act must be shown, in order to warrant the admission of declarations of intention. But whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party. The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact, as his own testimony that he then had that intention would be. After his death there can hardly be any other way of proving it."

On this basis, the three situations considered, declarations of intention by the deceased to attack the defendant, declarations of intention by the deceased to commit suicide and declarations of intention by a third person to commit the crime in question, should be governed by exactly the same rule. In each case the declarations of intention are receivable under an exception to the hearsay rule to prove the intention then asserted. But if the intention at the time of the declaration is too remote or otherwise not relevant, then such declarations are excluded, not because of the hearsay rule, but because the thing they tend to prove, *i. e.* intention at that time, is not to be proved at all.

Turning to the decisions in Missouri, it appears that the question of uncommunicated threats came up in the early case of *McMillen v. State*.⁶ An offer was made to show a recent threat by the deceased to shoot the defendant. In approving the rejection of this evidence, Judge Napton said: "As Jackson Logsdon" (the deceased) "was not a party to the prosecution, what he said is no more than the hearsay of any other man, and was therefore upon

6. (1850) 13 Mo. 30.

general principles inadmissible. Had his declarations been in *articulo mortis* or a part of the *res gestae*, they would have come within the exception to the general rule. The bill of exceptions does not show when the declarations were made. Recently is a word of indefinite character." The *res gestae* time limit applicable to declarations of things made under the stress of an exciting event, etc. is here misapplied to declarations of intention.

The same notion can be traced in the next case of *State v. Jackson*.⁷ There the threat was properly excluded because, according to the defendant's own version of the difficulty, the deceased was not attempting to carry out his threats, and there was no question of self-defense, but the Supreme Court announced the strange doctrine that threats were not admissible if sufficient time had elapsed for the blood to cool. As no such limitation has ever been suggested in case of threats by the defendant, the court was evidently influenced by this notion of *res gestae*—declarations accompanying an act. In *State v. Hays*,⁸ the offer was to prove communicated threats, but the opinion fails to distinguish the situation, and again puts undue stress on the time element, nearness to this difficulty.

The question came up again in *State v. Sloan*,⁹ where the offer was to show repeated threats down to the day of the difficulty. The Supreme Court held that they should have been admitted, saying: "The threats were continuous and frequent; they were all blended and inseparable; and the last threat, when the deceased had his revolver with him, showing an ability to carry out and accomplish his purpose, went to form a part of the *res gestae*, and must be considered as of the same transaction. They were therefore all admissible. to show whether the defendant acted in necessary self-defense." Here the court thought that the connection was sufficient to bring them within the elastic *res gestae* doctrine.

7. (1853) 17 Mo. 544.

8. (1856) 23 Mo. 287.

9. (1871) 47 Mo. 604.

When the question came up again in *State v. Elkins*,¹⁰ the time element was put on the proper basis. Judge Wagner there said: "When threats by the person killed should be admitted in evidence or rejected is a question involved in a great deal of doubt and uncertainty. If they have been made a long time antecedent to the commission of the act, they may be not only valueless, but entirely inadmissible. The relations of the parties may have since entirely changed, and in the intervening time the person making them may have wholly abandoned any previously conceived intention of harming the person against whom they were uttered.....Their relevancy, admission or rejection depends materially upon the circumstances surrounding each particular case." Here appears to be a tacit recognition that there is an exception to the hearsay rule, distinct from any doctrine of *res gestae*, under which threats are admissible to prove intention at the time of making such threats, and clearly that the relevancy of such prior intention as tending to show that the deceased was the aggressor depends upon the time and circumstances from which it may fairly be inferred that such intention continued.

The later cases add nothing to the Elkins case which may be taken as settling the rule. But in the case of *State v. Wright*,¹¹ approved in *State v. Porter*,¹² it was ruled that in case of threats by the defendant, remoteness does not affect the competency, but goes only to the weight of the evidence. This would seem to go too far against a defendant, and in any event the rule ought not to be more liberal than in case of threats by the deceased. This last proposition appears to be conceded by the opinion in *State v. Wilson*.¹³

The question of the admissibility of threats of suicide appears to have arisen for the first time in *State v. Punshon*.¹⁴ The defendant was tried for the murder of his wife by shooting. The claim of the defence was that she killed herself, and the defendant so testified. The parties had quarrelled and were alone in a car-

10. (1876) 63 Mo. 159.

11. (1897) 141 Mo. 333, 42 S. W. 934.

12. (1908) 213 Mo. 43, 111 S. W. 529.

13. (1913) 250 Mo. 323, 157 S. W. 313.

14. (1894) 124 Mo. 448, 27 S. W. 1111.

riage at the time. The circumstances were strongly against the defendant, and yet if the jury had believed that Mrs. Punshon really intended suicide, they might in view of that fact have credited Punshon's story, or at least have had serious doubts of his guilt. The defendant offered evidence of repeated threats of suicide because of their marital difficulties. This offer was excluded, and the defendant convicted. On appeal, Judge Burgess approved the ruling, saying: "The statements of the wife were not part of the *res gestae* as exclamations of pain, nor were they in respect to her health, and were properly excluded; and so were her statements that she intended to kill herself, for the same reason. She was not a party to the prosecution and the state was not bound by anything she may have said."¹⁵ It is interesting to see the exploded McMillen case invoked to sustain the ruling, without noticing the long line of cases overruling it through the last forty years. The Punshon case was reversed on other grounds, and on the second appeal the decision on this point was adhered to without comment.¹⁶

In *State v. Fitzgerald*,¹⁷ the defendant testified that the deceased shot herself, and the trial court *admitted* threats of suicide. Hence on the defendant's appeal this question was not before the court, but the same judge took occasion to review a number of cases, and concluded: "Such statements are only admissible in a criminal case when part of the *res gestae*, or when they are admissible as dying declarations. This we think not only supported by the decided weight of authority, but by reason as well."¹⁸ Curiously enough the court entirely overlooked the cases of threats by the deceased, which ought to have settled the rule for this situation.

In *State v. Bauerle*,¹⁹ the Punshon and Fitzgerald cases were followed without discussion, tho again the overruled McMillen case was cited. Finally in *State v. Ilgenfritz*,²⁰ the question was again examined by Commissioner Williams and the correct con-

15. Citing, *McMillen v. State* (1850) 13 Mo. 30.

16. *State v. Punshon* (1896) 133 Mo. 44, 34 S. W. 25.

17. (1895) 130 Mo. 407, 32 S. W. 1113.

18. Citing, *State v. Punshon* (1894) 124 Mo. 448, 27 S. W. 1111.

19. (1898) 145 Mo. 1, 46 S. W. 609.

20. (1914) 263 Mo. 615, 173 S. W. 1041.

clusion reached that threats of suicide should have been admitted, thus reaching the same result that had been worked out at least fifty years earlier in the first class of cases. It is unfortunate, however, that the learned Commissioner should have undertaken to distinguish such threats from hearsay by calling them "verbal acts." If the term "verbal acts" must be retained, it ought to be limited to cases which do not involve a hearsay use of words, where the words do not amount to an assertion of the fact to be established, but furnish only circumstantial evidence of it. For example, on the issue of sanity the assertion by the alleged lunatic that he was the Emperor Napoleon would be merely circumstantial evidence of a disordered mind. Certain profane expletives might in like manner evidence annoyance or temper. And so certain false assertions might circumstantially evidence a particular intention. Such things might be called verbal acts to distinguish them from hearsay. But confusion is bound to result from a failure to recognize that declarations of intention or of any other mental state, are hearsay, but nevertheless admissible as an exception because of necessity.

The question of threats by a third person to commit the act with which the defendant is charged does not appear to have come before the Supreme Court until the case of *State v. Crawford*.²¹ At the trial of the defendant on a charge of arson, evidence of threats by a third person against the property of the prosecuting witness was offered and excluded. From the brief report it is impossible to tell what sort of threats were proposed to be proved, or when they were made, or whether there was any other evidence to connect such person with the offense. The Supreme Court approved the ruling below on the ground that such threats were *res inter alios*, and had no bearing on the guilt of the accused. It is therefore impossible to say what this case stands for.

The same question arose again in *State v. Taylor*.²² The defendant was charged with burglary in breaking and entering a country store early in the morning; his claim was that he found

21. (1889) 99 Mo. 74, 12 S. W. 354.

22. (1896) 136 Mo. 66, 37 S. W. 907.

the door open and went in expecting to find some one in charge. Evidence of threats by a third person was excluded. Judge Sherwood approved the ruling, saying: "The offer of defendant to prove that Jim Baker, the blacksmith, had made a key which would fit and unlock the store in question, and that he intended to burglarize it, was properly rejected. Mere threats by third persons to commit the crime charged against the accused, or the confessions of such persons in open court that they committed the crime, is wholly inadmissible in defense of the party on trial, because such matters are purely hearsay." The court added that if some overt act on the part of Baker had been proved, or if he had been shown to have been in the immediate vicinity at the time, a different ruling might have been proper. The reason given by the court that the threats were hearsay, while true in fact, furnished no objection in law, because of the exception for declarations of intention. They are not to be classed, as the court did, with subsequent confessions which are narratives of past transactions, and for which there is no hearsay exception. If the threats were properly excluded, it was not because they were hearsay, but because there were not sufficient other facts to warrant any inference that Baker had broken into the store.

On the latter proposition it would seem that enough had been shown to admit the threats, because it surely can not be necessary to make such a showing as would convict the third person—a less degree of certainty than that might properly raise a reasonable doubt of the defendant's guilt. The question arose a third time in *State v. Barrington*.²³ The defendant was convicted of murder on strong circumstantial evidence. His own account of the affair was that he accompanied the deceased out into the country at night to meet some strangers on business; that a dispute arose and these strangers shot the deceased. Defendant offered to prove that deceased was engaged in a swindling business in which he made a number of enemies who had threatened him with violence. This evidence was excluded. The Supreme Court affirmed the ruling, without any particular discussion, on the authority of the Crawford case and the Taylor case, quoting the fore-

23. (1906) 198 Mo. 23, 95 S. W. 235.

going excerpts from the two opinions. The court also cited a case from West Virginia,²⁴ and one from Wisconsin,²⁵ in each of which it was broadly announced that threats by third persons were not admissible because they had no bearing on the guilt or innocence of the accused.

The Barrington case therefore leaves the question in confusion. The same reason that excepts threats of the deceased from the hearsay rule on the question of self-defense or suicide, is equally applicable to threats by a third person. Such a state of facts as would make the prior intention of the defendant to commit the act a relevant fact, must equally make the intention of a third person relevant.

The Barrington case may possibly be supported on the ground that there was no evidence to connect the threats offered to be proved with the strangers who were claimed to have done the shooting, tho it is certainly arguable that the fact that some unknown person had a grudge against the deceased and the intention of injuring him would tend to corroborate the defendant's testimony as to the attack of strangers.

The author is not aware of any later case in this state dealing with this question. Hence the problem of threats by third persons remains to be settled, when the question arises, on the reason and analogies furnished by other cases of declarations of intention.

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24. *Crookham v. State* (1871) 5 W. Va. 510.

25. *Buel v. State* (1899) 104 Wis. 132.

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NOTES ON RECENT MISSOURI CASES

EMINENT DOMAIN—CONDEMNATION BY MUNICIPALITY OF LAND ALREADY DEVOTED TO A PUBLIC USE. *City of St. Louis v. Moore*.¹—The city of St. Louis desired to extend a certain street. Under its general power to appropriate land for the construction of streets, the city instituted proceedings to condemn a narrow strip of land along the edge of property used for school purposes and upon which a school building was located. The Supreme Court held, "that the power of a city to condemn property for street purposes is limited to private property, and does not extend to property of the state, or property held by a subordinate agency of the state, as distinguished from other corporations."

It seems to be unquestioned that the legislature may authorize the condemnation of property already devoted to a public use.² It is equally well established that a general delegation of the power of eminent domain to a municipal or private corporation, does not confer the power to take such property unless it can be implied from the general grant.³ The authority to take property held by a private cor-

*Absent on leave 1916-17. During Professor Hudson's absence the Law Series will be in charge of Dean James.

1. (1917) 190 S. W. 867, BOND, J., dissenting.

2. Lewis, *Eminent Domain*, § 276; 15 Cyc. 612 and cases cited in note 82.

3. *City of Hannibal v. Hannibal and St. Joseph Ry. Co.* (1872) 49 Mo. 480; *In re City of Buffalo* (1877) 68 N. Y. 167; *Baltimore and Ohio and Chicago R. R. Co. v. North, et al.* (1885) 103 Ind. 486; *In re Milwaukee Southern Ry. Co.* (1905) 124 Wis. 490.

pation for public purposes may be inferred from a general delegation of the right of eminent domain.⁴ In Missouri, prior to the decision in the principal case, there have been no cases deciding squarely whether or not property held by one instrumentality of the state could be condemned by another in the absence of express authorization to do so. Other jurisdictions, however, present a variety of decisions in which condemnation of property under such circumstances has been supported on the ground of an implied grant. In the case of *Inhabitants of Easthampton v. County Commissioners*,⁵ which is apparently identical with the principal case, the plaintiff sought to take, for street purposes, a narrow strip of land which was part of the grounds of a public school. The court held that as the existing use, altho considerably impaired would not be wholly prevented, the authority to take the land could be inferred from the power of the city to take property for street purposes. *Rominger v. Simmons*⁶ also, with practically the same facts as the principal case, held that the strip of land could be taken as the land was not absolutely necessary for the use of the school. The right to condemn state property set aside for a deaf and dumb asylum has been upheld under the doctrine of implied grant,⁷ and likewise, the power of a city to place a highway across land held by another city in which the water pipes of the latter were laid, has been conceded.⁸ These cases go on the principle that as the existing use was not seriously interfered with, and the contemplated use reasonably necessary, the power to condemn the land could be inferred from a grant of general power.

In most of the cases involving this question, in which it has been held that authority to take such property did not exist, the courts have apparently placed their decisions on the ground that the subsequent use would destroy or seriously cripple the prior use, and therefore they have refused to infer the legislative intent to grant such power.⁹ In *In re City of Utica*,¹⁰ it was held that a provision in a city charter that the city could appropriate for street purposes any real estate not belonging to the city did not authorize the city to condemn land used for a state hospital for the reason that such appropriation "would absolutely deprive the state of all benefit and use in the property taken and essentially interfere with the use of the

4. *St. Louis, Hannibal and Kansas City Ry. Co. v. Hannibal Union Depot Co.* (1894) 125 Mo. 82, 28 S. W. 483; *St. Louis and Suburban Ry. Co. v. Lindell Ry. Co., et al.* (1905) 190 Mo. 646, 88 S. W. 634; *Louisville and Nashville Ry. Co. v. City of Louisville* (1908) 131 Ky. 108.

5. (1891) 154 Mass. 424.

6. (1882) 88 Ind. 456.

7. *Indiana Central Ry. Co. v. State* (1852) 3 Ind. 421.

8. *City of Boston v. Inhabitants of Brookline* (1892) 156 Mass. 172.

9. *State v. Montclair Ry. Co.* (1872) 35 N. J. L. 328; *Tyrone School District's Appeal* (Pa. 1888) 15 Atl. 667; *In re Milwaukee Southern Ry. Co.* (1905) 124 Wis. 490.

10. (1893) 26 N. Y. Supp. 564.

remainder." The courts are reluctant to infer the power to take public property when the principal object for conferring the authority to condemn may be beneficially exercised without taking the particular land in question, as where the necessity for taking land for a street can be avoided by a slight curve in the street.¹¹

The authority to take part of a public square for the purpose of erecting a school house thereon was denied in *McCullough v. Board of Education*.¹² In *Mayor of Atlanta v. Central Ry. Co.*,¹³ it was held that the city under a general power to condemn property for streets could not take part of the land used for railway car shops. The language of these two cases indicates that property held by an instrumentality of the state cannot be taken in any case unless there has been an express delegation of the power. The case of *City of Edwardsville v. County of Madison*¹⁴ appears to follow this minority view. However, another Illinois case, *City of Moline v. Green*,¹⁵ in holding that the city could not take a strip from the library grounds to widen a street, recognized the fact that property may be so taken if it does not destroy the previous use.

It is submitted that on principle property held by a subordinate agency of the state is not exempt, as such, from condemnation proceedings under a general delegation of the power of eminent domain. Whether the implied power exists in a particular instance is a question of legislative intent to be inferred from the express words of the statute and by the application of the statute to the subject matter.¹⁶ There must be a reasonable necessity for the taking,¹⁷ and the second use must not destroy or seriously impair the previous use.¹⁸ The doctrine of implied power to condemn property devoted to a public use rests on the principle that grant of power to do a particular thing carries with it the implied authority to do all that is necessary to accomplish that purpose.¹⁹ The legislature creates municipalities to further certain objects of general concern and gives them general powers to be used to that end. The power to take property in a city, even tho it is subject to an existing public use by an

11. *In re Pottsgrove Township Road* (1888) 5 Pa. Co. Ct. Rep. 361. In the case of *In re Milwaukee Southern Ry. Co.* (1905) 124 Wis. 490, 501, it was said, "It must appear that the rights granted when applied to the condition and circumstances covered by it can not be beneficially exercised without the taking of property already devoted to a public use."

12. (1878) 51 Cal. 418.

13. (1874) 53 Ga. 120.

14. (1911) 251 Ill. 265.

15. (1911) 252 Ill. 475.

16. Lewis, Eminent Domain, § 276.

17. *Cincinnati, Wabash and Michigan Ry. Co. v. City of Anderson* (1894) 139 Ind. 140; *Butte, A. & P. Ry. Co. v. Montana U. Ry. Co.* (1895) 16 Mont. 504.

18. *Boston v. City of Brookline* (1892) 156 Mass. 172; *Steele v. Empsom* (1895) 142 Ind. 397.

19. *Mobile and Girard Ry. v. Alabama Midland Ry. Co.* (1889) 87 Ala. 501.

agency of the state, for the purpose of establishing a street, the benefit of which inures to the public, might not unreasonably have been within the contemplation of the legislature, when such taking does not seriously interfere with the existing use.²⁰ As to what amounts to a material impairment of a use is a question as to which no general rule can be laid down. Two extreme cases may be noted. A highway placed across the track of a railroad is clearly not a serious infringement of the use by the railroad;²¹ while a highway placed longitudinally on the track is a complete annihilation of the existing use.²² Cases falling between these two cases present more difficult problems.

If the case of *City of St. Louis v. Moore* was decided on the ground that the proposed use would so injure the school property as to impair the object for which it was established, and in consideration of the relative importance of the two uses and the necessity for taking the land, the authority to condemn it could not be reasonably inferred, it seems to be in accord with the prevailing view. It is to be regretted, however, if the court intended to lay down the rule without qualification that express authority from the legislature is necessary to condemn "property of the state or property held by a subordinate agency of the state."

It is highly desirable that public property be protected, or else, as was said in the case of *City of Edwardsville v. City of Madison*,²³ "the school district might condemn the engine house for a school house, the county might condemn the school house for a court house, and an endless chain of condemnation by various municipalities be set in operation." But the principles by which such power is implied in certain cases, would not lead to such proceedings if properly applied to the circumstances of each particular case. A balancing and adjustment of conflicting public interests is demanded by public convenience and necessity whenever practicable, and may well be presumed to have been contemplated by the legislature in conferring the power upon a city to condemn property for the purpose of constructing streets.²⁴

J. C. BOUR

20. FOLGER, J., in the case of *In re City of Buffalo* (1877) 68 N. Y., 167, 171, said, "Is there from the language in which these powers are given, or from any of the circumstances attending such gift, or from any of the necessities of the city, existing, or actually foreseen when it was given, a necessary, that is, an unavoidable implication, that the legislature gave or meant to give such power?"

21. *City of Hannibal v. Hannibal and St. Joseph R. R. Co.* (1872) 49 Mo. 480.

22. *New Jersey Southern Ry. Co. v. Long Branch Commissioners* (1876) 39 N. J. L. 28.

23. (1911) 251 Ill. 265.

24. HOLMES, J., in the case of *Inhabitants of Easthampton v. County Commissioners* (1891) 154 Mass. 424, said, "when it is considered that very large tracts of land are often appropriated to school purposes, it is impossible to accept an unqualified rule that no part of such land can be taken, for a way under any circumstances without express enactment."

EQUITY—NOTICE OF BUILDING RESTRICTION.—*Zinn v. Sidler*.¹—The defendant bought a lot in a residence subdivision, the plat of which had been filed and recorded in accordance with the statute.² Upon the plat, to which reference had been made in deeds in defendant's chain of title, a dotted or broken line marked "building line" had been drawn at a distance of twenty feet from the street, except in one instance, where the distance was only fifteen. The plaintiff was the owner of other lots in the subdivision and this suit was brought to obtain an injunction against the defendant restraining him from building nearer the street than the distance indicated by the "building line" on the plat. The defendant had no other notice of the existence of the restriction than that given by the plat and it does not appear that he had ever seen the plat. The Supreme Court denied the plaintiff the injunction sought.

This decision seems to be contrary both to the weight of authority and to what may be regarded as sound economic policy. A purchaser of land is chargeable with notice of all restrictions appearing in his chain of title or concerning which he is put upon inquiry,³ and a plat of such land, or of a larger tract including it, is in the chain of title.⁴ In addition, if the purchaser has knowledge of facts which would put a reasonable, prudent man upon inquiry as to the title, he is charged with notice of the existence of restrictions of which he could have learned had he inquired.⁵

In the case of *Tallmadge v. East River Bank*,⁶ the defendant was held to be put upon inquiry and hence charged with notice of a building line restriction because of his knowledge that the house purchased as well as all the others in the block were built along a uniform front line. No reference to a building line appeared in his deed. In *Lawrence v. Woods*,⁷ the plat showed a tract marked "residence area," and it was held that an injunction would issue at the suit of the lot owner within this area against another restraining the latter from using his lot for other than residence purposes.

In *Simpson v. Mikkelsen*,⁸ the facts of which are identical with those in the present case, the Supreme Court of Illinois held that a purchaser was bound by the restriction, the reference in the plat giving him notice of its existence. In *Smith v. Young*,⁹ an easement was held to have been created for the benefit of all of the abutting lots by a plat referred to in the deeds of such lots as a part of the de-

1. (1916) 187 S. W. 1172.

2. Revised Statutes 1909, § 10290.

3. *King v. Trust Co.* (1910) 226 Mo. 351, 126 S. W. 415.

4. *Kindsey v. Smith* (1914) 178 Mo. App. 189, 166 S. W. 820.

5. *Turner v. Edmonston* (1908) 210 Mo. 411, 109 S. W. 33.

6. (1862) 28 N. Y. 105.

7. (1909) 54 Tex. Civ. App. 233, 118 S. W. 551.

8. (1902) 196 Ill. 575.

9. (1896) 160 Ill. 163, 43 N. E. 486.

scription. A strip of land was indicated by dotted lines upon the plat with the words "reserved for private alley." This strip of land formed a connection between the street and an alley otherwise inaccessible, altho the solid lot lines passed unbroken thru the dotted lines. In *Henderson v. Hatterman*,¹⁰ it was held that when a deed refers to a plat the particulars shown upon that plat are as much a part of the deed as tho they had been recited in it.

Some of the cases referred to by the Supreme Court of Missouri in support of its decision in *Zinn v. Sidler* seem to be cited for such general statements as that building restrictions in conveyances of the fee are regarded unfavorably and are strictly construed, and do not seem otherwise to be in point.¹¹ The other cases cited are *Hisey v. Church*,¹² in which the question of notice does not seem to be involved tho there is a *dictum* to the effect that a purchaser of land subject to a restriction is not bound thereby unless he has notice of it, and *Miller v. Klein*¹³ which involves an entirely different question, one of laches or waiver of the right to enforce the restriction of which defendant had actual knowledge.

Authority, therefore, seems clearly against the decision in *Zinn v. Sidler*. It seems also contrary to public policy to refuse to enjoin a purchaser of a lot which is subject to an equitable restriction as to its use, from the violation of such restriction if he buys with knowledge or notice either of the restriction or of facts which would put a reasonable prudent person upon inquiry. That such a public policy exists and is recognized by the courts is apparent from a consideration of the case of *Miller v. Klein* which holds that an injunction will be issued without proof of damage to the plaintiff in case the defendant had notice of the existence of such restriction. As there is in this country no state regulation of residence districts and of building lines, it seems especially desirable to give full force and effect to such restrictions as have been created by owners of land for the benefit of purchasers from them, so far as this can be done without affecting the rights of bona fide purchasers for value and without knowledge or notice. The court in *Zinn v. Sidler*, however, in holding that one who refuses to follow up what notice he has lest he prejudice his own personal interests, seems to create a type of bona fide purchaser new to the law.

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10. (1893) 146 Ill. 555, 34 N. E. 1041.

11. *Scharer v. Panther* (1907) 127 Mo. App. 433, 105 S. W. 668; *Kitchen v. Hawley* (1910) 150 Mo. App. 497, 131 S. W. 142; *Bolin v. Tyrola Investment Co.* (1913) 178 Mo. App. 1, 160 S. W. 588.

12. (1908) 130 Mo. App. 566, 109 S. W. 60.

13. (1913) 177 Mo. App. 557, 160 S. W. 552.

EVIDENCE—ENTRIES IN THE REGULAR COURSE OF BUSINESS. *Schwall v. Higginsville Milling Co.*¹—The plaintiff sued the defendant, a resident of Missouri, for damages arising from a breach of a contract to deliver flour in installments in New York. Each installment was to be paid for on delivery. The defendant refused to deliver subsequent installments claiming that the plaintiff had not paid until two weeks after the arrival of the last preceding installment in New York. To prove the time of the arrival of this shipment, copies from the books of original entry of the New York Central Railroad, over which the flour had been shipped, were admitted. These entries were made by various clerks in the usual course of business but seem to have been copied from memoranda made by others at the time of the happening of the events recorded. The witness who made the copy of these entries used at the trial had compared the entries with the original memoranda. He had not made the original entries himself and seems to have had no personal knowledge as to the facts stated, but he had charge of the railroad company's books and records at the station at which the flour was received. The Kansas City Court of Appeals held that the copies were admissible.

There would seem to be only two ways in which such copies might possibly be used: the first, under the principles governing the refreshing of a witness' recollection; the second, under the exception to the hearsay rule permitting the use of entries made in the usual course of business. To permit the use of a record or other writing to refresh a witness' recollection, it must appear that the writing was made at or about the time of the event recorded and the witness must guarantee that it refreshes his recollection so that he can now testify from his present revived recollection, or that it contains an accurate account of the fact as he knew it when it happened, and that he either made or saw the writing when the facts were fresh in his mind, tho he has no present recollection of them. It is not necessary that the record in either case should have been made by the witness himself or that it should have been made in the regular course of business. It is proper for him to revive his present recollection from a copy when the original cannot be produced.² The Missouri courts generally allow the admission of entries made in the regular course of business when the entrant is alive and testifies, on the theory that the witness is refreshing his recollection.³ When they are used as evidence of his past recollection his testimony will consist principally in reading

1. (1917, Mo. App.) 190 S. W. 959.

2. Greenleaf, Evidence (16th ed.) vol. 1, § 439b.

3. *Mathias v. O'Neil* (1887) 94 Mo. 520, 6 S. W. 253; *Anchor-Milling Co. v. Walsh* (1891) 108 Mo. 277, 18 S. W. 904; *Gardner v. Gas & Elec. Co.* (1911) 154 Mo. App. 666, 135 S. W. 1023; *Lyons v. Corder* (1913) 253 Mo. 539, 162 S. W. 606.

these entries to the jury.⁴ In *Schwall v. Higginsville Milling Co.*, *supra*, the witness was allowed to testify from the copies made by him on the theory that he was refreshing his recollection. It is submitted that this is incorrect because it does not appear that the witness had personal knowledge of the transaction, and it is difficult to see how such a witness has any recollection to be refreshed. The case of *Anchor Milling Co. v. Walsh* cited by the court in support of this conclusion does not sustain it, because in that case it appeared the witness had personal knowledge of the transaction. In *Anderson v. Volmer*⁵ the plaintiff testified that the amount sued on was correct, because before the trial he had looked at the account book kept by his clerk and had found the account sued on corresponded with it. This evidence was rejected, but it would seem according to the language of the court in *Schwall v. Higginsville Milling Co.*, it should have been received as refreshing the witness' memory.

It remains to be determined whether these copies are admissible as copies of entries made in the usual course of business. Under an exception to the rule excluding hearsay, original entries made in the usual course of business or occupation by a person since deceased or otherwise unavailable are admissible in evidence. There are two general principles underlying all exceptions to the hearsay rule. There must be either an opportunity to cross-examine or some guarantee of trustworthiness to take the place of cross-examination and there must be a necessity for the use of such testimony.⁶ The requirement of a guarantee of trustworthiness in the case of entries made in the regular course of business or occupation is met by showing that the entries were not mere casual memoranda but were part of a system of regular entries, and that they were made contemporaneously, or substantially so, with the transactions recorded, and, in most instances, it is necessary that the entrant should have had personal knowledge of the facts recorded. The necessity principle is satisfied by showing that the entrant is unavailable because of death, absence from the jurisdiction, illness, insanity, etc.⁷ Whether the mere inconvenience of calling all the persons who cooperated in making the entries will permit the entries to be used will be discussed later.

The Missouri cases are not very clear as to whether there must be a necessity for the use of such entries before they are admissible. The cases may be divided into three classes: (a) those in which it appears that the entrant is dead or otherwise unavailable; (b) those in which the entries are introduced in evidence in connection with

4. *Anchor Milling Co. v. Walsh* (1891) 108 Mo. 277, 18 S. W. 904.

5. (1884) 83 Mo. 403.

6. Wigmore, Evidence §§ 1421, 1422.

7. Greenleaf, Evidence (16th ed.) vol. 1, § 120a; Wigmore, Evidence, §§ 1521-1526.

the testimony of the person who made the entry or knew of the transaction; (c) those in which the entries are offered without any accounting for the parties who participated in making them.

(a) Where the entrant is dead or otherwise unavailable, these entries made by him in the course of business are admissible on proof of his handwriting.⁸ There is clearly a necessity for such entries in order to prevent a failure of justice.

(b) It also seems that these original entries are admissible in evidence in connection with the testimony of the clerk who made them, and the majority of the Missouri cases says that they are admissible as aids to the testimony of the entrant.⁹ If this means that they are used to refresh the recollection of the witness, their admission does not constitute an exception to the rule excluding hearsay. Some of the cases last above cited also rest the admissibility of these entries on the ground that they are a part of the *res gestae*. This phrase is used very loosely by the courts. "It is ambiguous and unmanageable in all of its uses . . . It serves merely to aid in the case in hand the judicial disinclination to ascertain and state specifically the reason for admission."¹⁰ In *Affick v. Streeter*¹¹ the court does not discuss the ground on which it admits these entries, but holds merely that when identified by the clerk who made them, they are admissible in evidence. Nothing, however, is said about *res gestae* and it does not seem possible to sustain the ruling of the court upon the principle of refreshing recollection, as the witness apparently had no personal knowledge of the facts recorded.

Thus it is seen that while the courts are somewhat uncertain as to the principle on which these entries are admitted, they hold that the entries are nevertheless admissible, and apparently without regard to considerations of refreshing recollection or to those of necessity. Missouri is not alone in this regard. Courts in many other states have also held that such entries are admissible in connection with the testimony of the person who made them.¹² Such a result

8. *Fulkerson v. Long* (1895) 63 Mo. App. 270; *Milne v. Railroad* (1910) 155 Mo. App. 465, 135 S. W. 85.

9. *Mathias v. O'Neil* (1887) 94 Mo. 520, 6 S. W. 253; *Anchor Milling Co. v. Walsh* (1891) 108 Mo. 277, 18 S. W. 904; *Commission Co. v. Bank* (1904) 107 Mo. App. 426, 81 S. W. 508; *Ruth Tool Co. v. Spring Co.* (1909) 146 Mo. App. 1, 123 S. W. 253; *Gardner v. Gas & Electric Co.* (1911) 154 Mo. App. 666, 135 S. W. 1023; *Lyons v. Corder* (1913) 253 Mo. 539, 162 S. W. 608.

10. Wigmore, Evidence, §§ 1795, 1796.

11. (1909) 136 Mo. App. 712, 119 S. W. 28.

12. *Weeden v. Hawes* (1834) 10 Conn. 50; *State v. Shinnborn* (1866) 46 N. H. 497; *Moots v. State* (1871) 21 Ohio St. 653; *Gilbert v. Sage* (1874) 57 N. Y. 639; *Newell v. Houlton* (1875) 22 Minn. 19; *Anderson v. Edwards* (1877) 123 Mass. 273; *Culver v. Marks* (1889) 122 Ind. 554; *Baldridge v. Penland* (1887) 68 Tex. 441; *Pauly v. Pauly* (1895) 107 Cal. 8; *Life Ins. Co. v. Smith* (1899) 119 Mich. 171; *Hopkins v. Stefan* (1890) 77 Wis. 45; *Almy v. Allen* (1901) 22 R. I. 595; *Chicago Ry. Co. v. Strawboard Co.* (1901) 190 Ill. 268.

seems to be unobjectionable. The business world relies on entries of this kind in its transactions without reference to necessity or refreshing recollection. So long as they appear trustworthy and are properly identified it would seem to be undesirable to limit their admissibility further, except, perhaps, to require the production of the original book of entries.

(c) Since it seems that the admissibility of these entries no longer depends, in Missouri at least, on any principle of necessity for the use of them, a question arises whether it is necessary for the clerk or clerks who cooperated in making the entries to identify them, provided these clerks can be produced. There is a great variety of decisions on this point. Where several persons have cooperated in making the entry, and the original observer is not called some courts hold the records are inadmissible even tho that person is out of the jurisdiction.¹³ Other cases hold that the clerk who made the entry should be produced.¹⁴ In several Missouri cases such entries were admitted without accounting for the clerk who made them.¹⁵ In only one of these cases however was the point raised and in that case the court refused to discuss it.¹⁶ While the weight of authority is probably against such a conclusion, there are decisions in accord with it.¹⁷ Where a great many clerks have participated in making the entry, the practical inconvenience and cost of having them all present to identify the books and to swear to the correctness of the entries would outweigh the probable benefit of doing so. In such a case the testimony of the supervising officer, who knew them to be books of regular entry should be sufficient.¹⁸ But the decision should be limited to those cases in which a showing is made that it would be materially inconvenient to produce the clerk or clerks who made the entry. However, it seems, undesirable to allow the use of copies of entries without the production of the original if such are called for and are available.¹⁹

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13. *Kent v. Garvin* (1854) 1 Gray 150; *Chicago Lumbering Co. v. Hewitt* (1894) 64 Fed. 314.

14. *Ford v. St. Louis Ry. Co.* (1880) 54 Ia. 723, 7 N. W. 126; *Kearns v. McKean* (1888) 76 Col. 87, 18 Pac. 122; *House v. Beak* (1892) 141 Ill. 290, 30 N. E. 1065; *Hoogenwerff v. Flack* (1905) 101 Md. 371, 61 Atl. 184.

15. *Robinson v. Smith* (1892) 111 Mo. 205, 20 S. W. 29; *Missouri E. L. & P. Co. v. Carmody* (1897) 72 Mo. App. 534; *Wright v. C. B. & Q. Ry. Co.* (1906) 118 Mo. App. 392, 94 S. W. 555; *Overy v. Tucker* (1909) 137 Mo. App. 428, 118 S. W. 672.

16. *Overy v. Tucker* (1909) 137 Mo. App. 428, 118 S. W. 672.

17. *Donovan v. Ry. Co.* (1893) 158 Mass. 650; *Northern Pac. Ry. Co. v. Keyes* (1898) 91 Fed. 47; *Continental Nat. Bank v. First Nat. Bank* (1902) 108 Tenn. 374; *U. S. v. Venable & Co.* (1903) 124 Fed. 267; *Lumber Co. v. Scentic Ry. Co.* (1916) 23 Cal. App. 716.

18. Wigmore, Evidence, § 1530.

19. Wigmore, Evidence, § 1532.

ESTATES—IMPLICATION OF REMAINDERS. *Lockney v. Campbell*.¹—In 1860 a testator devised certain lands to his son, and provided that if the son should die "leaving no children" the testator's daughter should "inherit" the land. The testator's son is still alive, and his living children seek to have the title to the land ascertained, and have named their father's grantee as defendant. It was contended on behalf of the plaintiffs that the testator's son took only a life estate, with an implied contingent remainder to his surviving children and an alternate contingent remainder to the testator's daughter. The Supreme Court held, however, that the testator had devised to his son a fee simple subject to an executory devise to the testator's daughter in the event of the son's dying without leaving children. The interest of the son was called a "defeasible fee."

This decision is particularly welcome because of the position recently taken by Woodson and BLAIR, JJ., in *Faris v. Ewing*² where the facts were somewhat similar and where both of these judges favored the implication of remainders in the children of a devisee upon whose death without children the lands were given over. Both of these judges now concur in holding that there is no implication of a remainder and no consequent restriction of the first devise to a life estate in such a case. In commenting on *Faris v. Ewing*,³ the writer criticised the view taken by these judges in that case, on the ground that such implication was not necessary in order to avoid an intestacy, and except in the implication of estates tail, it is not justified for any other reason.

In deciding the principal case, the court relied upon *Brown v. Tuschoff*⁴ and *Collier v. Archer*.⁵ In *Brown v. Tuschoff*, there was a devise to two of the testator's grand-children with the provision that "in case either one should die leaving no heirs, the other shall be entitled to it all." One of the grand-children died childless, and the court held that the executory devise to the other thereupon took effect. *Brown v. Tuschoff* is therefore no authority for the principal case. In *Collier v. Archer*, there was a conveyance by deed in 1836 to X and his heirs in trust for A for life, and at A's death the conveyance to X was to be "null and void," and the trust was to cease and the land was "to revert to and be the absolute property" of B and C, and if B and C died without issue, then the land was to "revert to and be the absolute property" of D and her heirs. In 1852 B gave a warranty deed to the land, and on his death in 1905 his issue claimed the land against one who possessed under the warranty deed.

1. (1916) 189 S. W. 1174.

2. (1916) 183 S. W. 280.

3. See 12 Law Series, Missouri Bulletin, p. 48.

4. (1911) 235 Mo. 449, 138 S. W. 497.

5. (1914) 258 Mo. 383, 167 S. W. 511.

A, the life tenant, had died in 1862. Relying on *Gannon v. Albright*,⁶ which was after the statute on failures of issue and so not in point, the court held that B took a fee simple. The opinion is wholly inadequate. The contention on behalf of B's issue that they took an implied remainder was based on the gift over on an indefinite failure of issue. Since the deed took effect prior to the statute making failures definite, the ultimate gift was remote and void, tho it would not have been so if it could have taken effect as a remainder after a fee tail. The fact that the word heirs was nowhere used in the deed prevented any implication of a fee tail,⁷ and the invalidity of the gift over which could only take effect as an executory limitation precluded any implication of a gift to B's issue. *Collier v. Archer* was not authority for the decision in *Lockney v. Campbell* because it involved a deed, with a void gift over on an indefinite failure of issue, and because the prior gift was to the donee absolutely.

The implication of fees tail in Missouri is established as to deeds and wills executed prior to the statute making all failures of issue definite.⁸ This statute was enacted in 1845.⁹ Altho in terms it applied only to remainders, it has been extended by construction to executory limitations.¹⁰ The statute was overlooked in *Harbison v. Swan*.¹¹ In *Cross v. Hoch*,¹² a testator gave certain land to his daughter Sarah "and her heirs," and provided that it should be held in trust "for her use, and should the said Sarah die without children, then said property shall be divided among my other daughters." The court relied upon the words used in holding that Sarah took only a life estate with a remainder to her children who survived her. This result was reached partly by reading the words *and her heirs* to mean *and her children*, when taken in connection with the devise over when Sarah died without children; partly also the result was due to the fact that a trust had been created for Sarah's use. *Cross v. Hoch* was not cited by the court in *Lockney v. Campbell*. In *Yocum v. Siler*,¹³ a testator devised lands to his son William, with a gift over in the event of William's death without issue. The court *en banc* refused to imply a fee tail, and said that after the birth of issue William had an absolute estate at least for the purpose of conveyance; the implication of fees

6 (1904) 183 Mo. 238, 81 S. W. 1162.

7 *Tygard v. Hartwell* (1907) 204 Mo. 200, 102 S. W. 989.

8 *Farrar v. Christy* (1857) 24 Mo. 453; *Ohlem v. Williams* (1860) 29 Mo. 288; *Rothwell v. Jamison* (1899) 147 Mo. 601, 49 S. W. 503.

9 Revised Statutes 1845, p. 116. Apart from such statutes the modern tendency is to find that a definite failure was intended where any expression may be seized on for this purpose. *Whitcomb v. Taylor* (1877) 122 Mass. 243; *Parkhurst v. Harrower* (1891) 142 Pa. St. 432; *Rudkin v. Rand* (Conn., 1914) 91 Atl. 198.

10 *Faust v. Burner* (1860) 30 Mo. 414; *Naylor v. Godman* (1891) 109 Mo. 543, 19 S. W. 56; *Yocum v. Siler* (1900) 160 Mo. 281, 61 S. W. 208.

11 (1874) 58 Mo. 147.

12 (1899) 149 Mo. 325, 50 S. W. 786.

13 (1900) 160 Mo. 281, 61 S. W. 208.

tail in conveyances since 1845 is a thing of the past. But *Cross v. Hoch* must still be reckoned.

In *Lockney v. Campbell*, there is no basis for it could not possibly be contended that the indefinite failure of issue. No intention was the first devisee to a life estate. The event is not sufficient evidence of any intention on the part to confer an estate on the son's children. Cross limitation to the children could be implied on which would not have the effect of reducing the life estate, but such executory limitations are not the implication of a cross limitation would prevail case there is no possibility of an intestacy, since a fee simple. The decision may not be in line with it is entirely possible the same court would have in the same way. But since the implication is abandoned, it is believed that there is no furthering estates, except where the partial intestacy is the implication of a cross limitation. The decision causes in addition to clearing up any doubts which since *Faris v. Ewing*, it opens the way for a clear whole doctrine of implication of estates.

The opinion of BLAIR, J., seems to bear down subsequent language was insufficient to reduce the estate to a life estate. It must not be concluded essential that the first estate should be more than a testator confers an express life estate on a devisee either devise on the devisee's death without children of the first devisee would be implied. Taken by the House of Lords in *Scale v. Rawlins*,¹⁴ and the Supreme Court of Illinois in *Bond v. Moore*,¹⁵ the dissatisfaction with the statutory course of descent is such that courts should enlarge the ordinary expression, instead of requiring intended gifts to be expressed.

INTERSTATE COMMERCE—BREAKING JOURNEY.
*of Southwestern Ry. Co.*¹ The plaintiff in this case carried his goods into a car at Humphrey, Arkansas, and Francis, Arkansas. Being desirous of proceeding to Delta, Mo., he purchased a ticket to Bernie, Mo., and carried his goods to that station as baggage. Upon getting off at Bernie,

14. (1892) Appeal Cases 342.

15. (1908) 236 Ill. 576.

1. (1916) 190 S. W. 423.

to Delta, rechecking the baggage. While standing on the track at Bernie the car and contents were destroyed. The plaintiff sued and recovered for the entire loss. At the trial he testified that the shipment had been divided up so that he could take advantage of lower rates. The Springfield Court of Appeals reversed and remanded the case on the ground that the trial court erred in holding the shipment intrastate and in excluding evidence of tariffs approved by the Interstate Commission affecting defendant's liability.

In determining whether or not commerce is interstate in character state courts look to and hold themselves bound by the decisions of the Supreme Court of the United States² and of the Federal courts. Any study of the question, therefore, involves a review of the decisions of those courts. The necessity and good policy of adhering to the Federal decisions upon these questions is manifest as this is the only means of avoiding a hopeless conflict, and the only means by which carriers and shippers may have assurance of any consistency in the law.

In the principal case the status of the plaintiff as a passenger was not discussed, the court treating the "baggage" as a shipment of freight. But since the court tests its decision on the intention of the plaintiff, admitted on the stand, it would seem to follow that the plaintiff, had he gone on the train from Bernie to Delta would have been deemed an interstate passenger. This precise point has not been much litigated. It arose squarely in an Arkansas case³ where the plaintiff wishing to go from A in Arkansas to T in Texas applied for a ticket from A to C in Arkansas. On the defendant's refusal he was compelled to pay the interstate rate to T., and he brought an action under an action under an Arkansas statute providing a penalty for overcharges. It was held that the journey between A and C was intrastate and that the local state statute was applicable.⁴ This decision disregards completely the doctrine of intention followed in *Reynolds v. St. Louis and Southwestern Ry. Co.* No valid distinction between passengers and freight, it seems, can be taken as the Interstate Commerce Act regulates passenger traffic as well as freight.

In view of recent decisions of the Supreme Court of the United States and of late reports of the Interstate Commerce Commission the Missouri decision seems preferable to that of the Arkansas court.⁵ In *Kanotex Refining Co. v. Atchison, Topeka and Santa Fe Ry. Co.*, the complainants before the commission had an oil refinery at C., in Kan-

2. *Lusk v. Atkinson* (1916) 186 S. W. 703; *Deardorff v. Chicago, Burlington, R. R. Co.* (1914) 263 Mo. 65, 77, 172 S. W. 333.

3. *Kansas City So. Ry. Co. v. Brooks* (1907) 105 S. W. 98.

4. This decision is criticized in a short note, 21 *Harvard Law Review* 370, on the ground that it violates the test of ultimate destination.

5. *Kanotex Refining Co. v. Atchison, Topeka & Santa Fe Ry.* (1915) 34 *Interstate Commerce Reports* 271; *Railroad Comm. of Louisiana v. Texas & Pacific Ry. Co.* (1912) 229 U. S. 336.

sas and a distributing station at W., in Oklahoma. In order to get a lower rate it shipped the oil from C. to R., in Kansas, where it employed an agent solely for the purpose of rebilling to W., in Oklahoma. The defendant refused to carry from C., to R., unless at the interstate rate. The Interstate Commerce Commission held that the complainants were unlawfully attempting to evade the provisions of the Interstate Commerce Act because the shipment was really interstate in nature.

This decision finds ample support in the adjudicated cases even where it is not the intention of the shipper to get lower rates. In *Ohio Railroad Commission v. Worthington*⁶ the state commission attempted to fix rates on shipments of coal from points in Ohio to be put on a vessel at Huron, Ohio, the coal being destined for points outside of Ohio. It was held that the shipments had taken on the character of interstate commerce and were not subject to state regulation. The billing in this case read from points in Ohio to Huron, Ohio. This decision was re-affirmed the following year by the Supreme Court of the United States in a case coming up on a writ of error to the Court of Civil Appeals of Texas.⁷ Lumber intended for export was shipped from R. in Texas to S. in Texas on local bill of lading naming the plaintiff as consignee. The plaintiff had sold the lumber to P., who provided the ships in which lumber was carried from S. Again the Supreme Court disregarded the bill of lading and called the shipment interstate while *en route* from R. to S. In a previous case the court had gone a step farther and ruled that a shipment between two points in Texas, the subject matter of which was seed cake, intended for export was interstate altho it was sometimes necessary to manufacture the cake into meal at the point of destination in Texas.⁸

The Missouri Supreme Court was confronted with a similar problem in *Lusk v. Atkinson*.⁹ J., a resident of Indiana bought railroad ties which were shipped from points in Missouri to Commerce in the same state. Here the ties were assorted and inspected and thereafter the largest part of them was shipped out of the state to complete sales made previously. The Public Service Commission ordered the railroads to charge state rates on the shipments to Commerce. This order was upheld in the circuit court but the Supreme Court sitting *en banc* reversed it in an opinion from which three of the judges dissented. The majority opinion was based on the intention of the shipper and on the fact that evasion of federal regulations would follow if by this means the shipment could be made subject to state superintendence. The minority agreed with the reasoning of the prevailing judges but

6. (1912) 225 U. S. 101.

7. *Texas & New Orleans Ry. Co. v. Sabine Tram Co.* (1913) 227 U. S. 14.

8. *Southern Pacific Terminal Co. v. Interstate Commerce Commission* (1911) 219 U. S. 498.

9. (1916) 186 S. W. 703.

thought that it did not apply because the shipments outside the state were not the identical cargoes shipped from a single point in the state. The three dissenting judges also took the view that Commerce was a distributing station and that the owner if he wished might have made shipments to points within the state as well as without. It is significant that the only shipment made from Commerce to a point in Missouri was made after the shipper had complained to the Public Service Commission.

The opinion of the minority may have been influenced by the holding of the United States Supreme Court in *Chicago, Milwaukee & St. Paul R. R. v. Iowa*.¹⁰ Coal was shipped from Illinois to Davenport, Iowa. The coal remained on tracks there for different periods of time, and was then reconsigned in the same cars to points in Iowa. In sustaining the right of the Iowa commission to make regulations of this part of the transaction the court said that the continuity of transportations was destroyed after the cars reached Davenport, the distributing center. Stress was laid on the fact that the shipper did not know where the coal was ultimately going at the time of the contract of shipment. In *Lusk v. Atkinson* the shipper knew at least that the ties were going to points outside the state altho he did not know where the particular ties were going until they had been assorted. In a recent case before the St. Louis Court of Appeals¹¹ the plaintiff had sold ties to a railway company to be shipped from a point in Louisiana to another point in the same state but at the request of the purchaser he billed them to a point on the purchaser's line outside the state. The court held that the billing did not control but that it was the intention of the parties that the shipment be continuous altho the last half of the transportation involved no costs to the shipper. It, therefore, came to the conclusion that the shipment was interstate.

Where the shipment from a point without the state to a point within is followed by a reshipment to a point within the problem has seemed to cause more difficulty in that it is not always clear when the continuity of the transportation has ended. This was the problem in *Reynolds v. St. Louis & Southwestern Ry. Co.*, and in support of the shipper's contention there was cited *Gulf, Colorado and Santa Fe R. R. v. Texas*.¹² While the actual decision in that case does not sustain the plaintiff's position the following *dictum* would seem to give it some weight: "If Hardin, for instance, had purchased a ticket from Hudson (North Dakota) to Texarkana (Texas), intending all the while to go on to Goldthwaite (Texas) he would not be entitled on his arrival at Texarkana to a new ticket from Texarkana to Goldthwaite

10. (1914) 233 U. S. 334.

11. *Werner Saw Mill Co. v. Kansas City So. Ry. Co.* (1916) 186 S. W. 1118.

12. (1907) 204 U. S. 403.

at the proportionate fraction of the rate prescribed by the Interstate Commerce Commission for carriage from Hudson to Goldthwaite. The one contract of the railroad companies having been finished he must make a new contract for his carriage to Goldthwaite and that would be subject to the law of the state within which that carriage was made."¹³ It is submitted that this language disregards the rule of intention so much stressed in subsequent cases, and is to that extent out of line with other decisions of the Supreme Court of the United States.

While the Missouri courts have recognized the intention of the shipper as bearing on the inter- or intrastate character of the shipment the rule, it seems, is not always applied uniformly. Where the shipper desiring to send his mules from Glasgow, Missouri, to Horatio, Arkansas, shipped them from Glasgow to Kansas City, Missouri, over one railroad to be transferred there to another which was to take the mules to Horatio, it was held that the shipment between Glasgow and Kansas City was intrastate.¹⁴ The latter railroad transported the shipment free because the plaintiff was to work for it. The court said the shipper had no intention to ship to Horatio and was concerned only with the shipment from Glasgow to Kansas City after which he was to have his transportation free. It would seem that the shipper's intention in this case is indistinguishable from that of the shipper in *Reynolds v. St. Louis & Southwestern Ry.*,¹⁵ the principal case, where he was concerned in the first instance only with getting the transportation to Bernie after which he was to get it to another point at a lower rate.

The shipper's intention, however, does not conclusively determine the nature of the shipment. Under some circumstances a shipment is deemed interstate without regard to the intention of the shipper. It is now generally held that where the shipment is between two points in the same state, but the transporting agency in the course of the journey between the termini passes beyond the state the shipment is interstate. It has been held in Missouri that where coal was shipped from a point in Missouri to another point in the state by a carrier whose route between the two points carried it outside the state it remained intrastate commerce.¹⁶ But in *Hanley v. Kansas City Southern Ry.*,¹⁷ it was held by the United States Supreme Court that such shipments were interstate. The court's conception of the underlying reasons is indicated by the use of a quotation from the opinion of Mr. Justice Field in *Pacific Coast Stamping Co. v. Railroad Commission*:¹⁸ "To bring transportation within control of the state as part

13. (1907) 204 U. S. 403, 413.

14. *Kolbmeyer v. Chicago & Alton R. R.* (1916) 192 Mo. App. 188, 182 S. W. 794.

15. (1916) 190 S. W. 423.

16. *Seawell et al. v. Railroad* (1893) 119 Mo. 222, 24 S. W. 1002.

17. (1902) 187 U. S. 617.

18. (1883) 18 Fed. 10.

of its domestic commerce, the subject transported must be within its entire voyage under the exclusive jurisdiction of the state." This view is now followed in Missouri.¹⁹ It is desirable as avoiding clashes between the states as to which has jurisdiction. In this type of case the intention of the shipper is not inquired into, the question of the nature of the commerce being determined by the physical facts involved in the transportation.

An interesting question arises when the shipment is between points in the same state but is carried beyond into another state by the same carrier. In *Deardorff v. Chicago, Burlington & Quincy R. R. Co.*,²⁰ the plaintiff shipped stock from Hale, Missouri, to the Kansas City Stock Yards, some of the contracts reading to Kansas City, Missouri. The Stock Yards Company had yards in Missouri and in Kansas. Those allotted to defendant carrier were in Kansas. The cars were carried into that state and there unloaded. The court, citing the Federal decisions, held the shipment interstate, *Graves and Brown, JJ. dissenting*. The court did not mention *Scammons v. Kansas City, St. Joseph & Council Bluffs R. R.*,²¹ a Missouri case cited by plaintiff, which held such a shipment to be intrastate. This indicates, as has been pointed out, that the Federal decisions are paramount. Judge Graves in the dissent advanced a view that has met with little favor, viz: that the billing controlled as the parties were estopped by its terms from making the claim that the shipment was interstate. Such a rule would make evasions of the Interstate Commerce Act comparatively easy. If in this case the defendant carrier had allotted to it, yards both in Missouri and Kansas the solution, it seems, would be more difficult. This question has arisen very recently.²² Shippers from various Missouri points shipped their grain to Kansas City, Missouri, grain dealers in Kansas City being the consignees. The cars on arrival were shunted off on "hold" tracks and samples sent from each car to the grain dealer who sold by sample. Some of the "hold" tracks were in Kansas. The Supreme Court in sustaining an order of the Public Service Commission held that the shipment was intrastate. Four opinions were handed down, *Graves, J.*, again holding that the bill of lading was conclusive. The court decided that no intention to ship beyond Kansas City, Missouri, could be implied, and that the cars were sent to the "hold" tracks in Kansas solely for the convenience of the carrier as

19. *Bowles v. Quincy, Omaha, etc. R. R. Co.* (1916) 187 S. W. 131; *Howard v. Chicago, Rock Island & Pacific Ry. Co.* (1916) 184 S. W. 906; *Porter v. Kansas City Southern Ry.* (1915) 187 Mo. App. 56, 172 S. W. 1153; *Mires v. St. Louis & San Francisco Ry.* (1908) 134 Mo. App. 379, 114 S. W. 1052.

20. (1914) 263 Mo. 65, 172 S. W. 333.

21. (1890) 41 Mo. App. 194.

22. *State v. Public Service Commission* (1916) 189 S. W. 377.

it did not appear that the shipper knew of this. This case is distinguishable from *Deardorff v. Chicago, Burlington and Quincy R. R.*, on the ground that in the latter it was the duty of the carrier to unload on the Kansas side and hence the essential character of the shipment was interstate.

The tendency of the Missouri courts, if the decisions up to the present can be regarded as establishing a tendency, to hold a shipment interstate rather than intrastate is desirable, it seems, as a step in the process of placing all commerce involving carriage under the supervision of one body, the Interstate Commerce Commission. The courts have taken a step in that direction by adopting the tests used by the Supreme Court of the United States in determining the inter- or intra-state character of commerce. These tests, simple in themselves, but often difficult in their application to particular facts, were concisely stated by BOND, J., in his concurring opinion in *State v. Public Service Commission*:²³ "The essential character of commerce is determined first, by the intention of the shipper, second by the nature and object of the shipment." The decision in the principal case, it would seem, is a necessary result of the application of this rule.

S. H. LIBERMAN.

MUNICIPAL CORPORATIONS—LIABILITY FOR FAILURE TO REMOVE SNOW AND ICE FROM SIDEWALKS. *Albritton v. Kansas City*.¹—The plaintiff was injured by falling on a sidewalk in Kansas City which was covered with snow and ice and brought this action against the city to recover the damages sustained. Six days before the accident ten inches of snow had fallen, which had not been removed from the sidewalk at the time of the plaintiff's fall. A path about eighteen inches wide had been beaten down thru the snow and this path had been converted by alternate freezing and thawing into ice with an extremely uneven and dangerous surface. The path, having remained in this condition for three or four days, was at the time plaintiff attempted to travel over it, covered by an inch of new snow then falling. The trial court overruled a demurrer to the evidence on the ground that the condition presented could reasonably be found by the jury to be far more dangerous than the general condition of snow covered sidewalks thruout the city. There was a judgment for the plaintiff which was reversed by the Kansas City Court of Appeals because of error in instructing the jury that the city was under a duty "to keep its sidewalks in a reasonably safe condition for travel." The Court of Appeals held that the duty of the city was to exercise reasonable care to keep its sidewalks in a reasonably safe condition.

23. (1916) 189 S. W. 377, 380.

1. (1916) 192 Mo. App. 574, 188 S. W. 239.

The court, after giving the above ground for the reversal, added: "a more serious error is that the hypothesis upon which a recovery by the plaintiff is authorized is so broad that it includes not only actionable but non-actionable defects. Snow allowed to remain on public sidewalks invariably, when subjected to alternate processes of thawing and freezing, becomes more or less rough, uneven, and slippery, and of course more or less dangerous. That we have pointed out is a natural and general condition for which the city can not be held responsible; and the instructions, in allowing recovery for such a condition, enlarged the scope of defendant's liability beyond its proper limits." Apparently the court is qualifying the general duty of the city to use due care to keep its sidewalks reasonably safe, by excepting snow and ice lying in the given conditions from the class of actionable defects. The question raised in this case is the extent to which the city is under a duty to remove snow and ice from its sidewalks.

The general duty of municipal corporations in Missouri is to use ordinary care to remove defects from streets and sidewalks.² In a few states this duty is created by statute;³ but in Missouri, as in the majority of the states, the duty is imposed by the common law.⁴ It is said to arise "by implication from the nature of the subject, and the vast power conferred upon such corporations, including the exclusive control of the streets."⁵

In the leading case of *Reedy v. St. Louis Brewing Association and City of St. Louis*,⁶ the Supreme Court of Missouri applies the general test of due care under all the circumstances to defects caused by snow and ice. In that case the plaintiff fell while attempting to cross smooth ice which covered the sidewalk. Counsel for the city contended that smooth ice was a non-actionable defect. The court held the city liable on the ground that smooth ice was a dangerous defect and the exercise of due care required the removal of such dangerous defects within a reasonable time if the removal was practicable. The ice had been on the sidewalk twenty four hours and this was held to be a reasonable time within which the city should have discovered and removed it. The ice was caused by a local flooding of the sidewalk by water from a leaky pipe and the court was of the opinion it was practicable to remove it. If the ice had covered the whole city then the city would not be liable on the ground of the impracticability of removal. The sole test applied is that of due care, and reasonableness and practicableness are material elements of due care.

2. *Maus v. Springfield* (1890) 101 Mo. 612, 14 S. W. 630; *Carvin v. City of St. Louis* (1899) 151 Mo. 334, 52 S. W. 210; 7 Law Series, Mo. Bull. 21; *McQuillin, Municipal Corporations*, § 2720; *Elliot, Roads and Streets* (2d ed.) § 611.

3. *Stanton v. Springfield* (1866) 94 Mass. 566.

4. *McQuillin, Municipal Corporations*, § 2720; *Elliot, Roads and Streets* (2d ed.) § 611.

5. *Kiley v. City of Kansas* (1885) 87 Mo. 103, 106.

6. (1900) 161 Mo. 523, 61 S. W. 859, 53 L. R. A. 805.

Some cases seem to follow the mechanical test liable for defects caused by smooth ice, or ice causes. The "rough ice" rule was first stated in *field*.⁷ The court in that case laid down the rule a non-actionable defect since mere smoothness has been a structural defect, and that snow or ice is defective only when it was so piled up as to form a surface. The authority of this decision was greatly weakened by *Cromarty v. Boston*,⁸ which held a glass and iron sidewalk to be a defect because of its slipperiness. *Stanton v. City of St. Louis* has been severely criticised for the reason that snow is often more dangerous than rough ice,⁹ but, as the United States its influence has been widespread.

The "natural cause" doctrine has no sound basis. In *Madison*,¹⁰ the court gave among other reasons for holding a strip of smooth ice a non-actionable defect the fact that the conditions are produced by natural causes, or the force of gravitation and temperature. Such places may be natural and common defects for which the municipality is not liable. Whether the defect is produced by artificial causes or by natural causes indeed all causes may not be said to be natural and the liability is the same. The liability arises not in the creation of the defect but in the failure to remove them. In the Missouri case *Reedy v. St. Louis Brewing Association and City of St. Louis* reasoning sometimes shows a confusion due to the "rough ice" rule and the "natural cause" doctrine. It is actionable defect if it is so localized as to be a danger. If there is a general condition of snow and ice, it is piled up so as to be more dangerous than the natural condition, then due care will require its removal.¹² If the sidewalks in the city are rough from the sudden freezing of the snow, it does not place an absolute duty on the city to make the sidewalks smooth after snow and ice have generally disappeared, but a failure to remove an isolated portion within a reasonable time. In all cases the test is due care under the circumstances and the city always has regard to the reasonableness of the

7. (1866) 94 Mass. 566.

8. (1879) 27 Mass. 329.

9. *Cloughessey v. City of Waterbury* (1883) 55 Conn. 278; *City of Hagerstown* (1902) 95 Md. 62; *McQuillin*, 111 Ill. 2789. See 7 L. R. A. (N. S.) 933.

10. (1893) 85 Wis. 187. See note to this case.

11. *Reedy v. St. Louis Brewing Association and City of St. Louis* (1909) 161 Mo. 523, 61 S. W. 859, 53 L. R. A. 805.

12. *Reno v. City of St. Joseph* (1902) 169 Mo. 431.

13. *Vonkey v. St. Louis* (1909) 219 Mo. 37, 117 S. W. 200.

14. *Jackson v. Kansas City* (1914) 181 Mo. App. 100.

In *Albritton v. Kansas City* while the Court of Appeals first lays down the correct principle of due care, its later statement that a more serious error was committed in including within the scope of the instructions non-actionable defects arising from rough, uneven and slippery snow and ice seems to indicate that the court was not entirely free from the influence of the mechanical tests mentioned above, the application of which in Missouri seems to have been abandoned for that of due care under the circumstances.

ROSCOE E. HARPER.

PARTITION—WHEN IS IT CONTRARY TO A TESTATOR'S INTENTION? *Shelton v. Bragg*.¹—A testator devised his "home place" to his daughter "to use, occupy and enjoy during her natural life . . . and at her death it is my will and desire that said above described lots or the proceeds thereof be equally divided between all my (other) children or their heirs" and the heirs of the daughter to whom a life estate was given. In refusing to authorize a partition of the property during the lifetime of the testator's daughter, the court said that such partition "would be in utter disregard of the plain directions of the testator as expressed in said will, and in contravention of the clear provisions of" the statute.² The case may also be rested on the ground that at least a part of the remainder was contingent at the time the partition suit was instituted.³ The decision is of interest, however, in that it indicates a disposition to apply liberally the statute forbidding partition contrary to a testator's intention.

The court has nowhere discussed the attitude with which it will approach the question of applying this statute, altho it has been applied in numerous cases.⁴ A testator's injunction against partition might have been respected by courts of equity apart from the statute. In *Stevens v. De La Vault*⁵ it was said "that a court of equity exercising its ancient jurisdiction uninfluenced by the statute above quoted, would not make partition at the suit of a devisee in express violation

1. (1916) 189 S. W. 1174.

2. Revised Statutes 1909, § 2596, first enacted in Revised Statutes 1825, p. 612.

3. This feature of the decision has been discussed in an article on "The Transfer and Partition of Remainders in Missouri," 14 Law Series, Missouri Bulletin, 3, 28.

4. *Lilly v. Menke* (1894) 126 Mo. 190, 211, 28 S. W. 643, 994; *Stevens v. De La Vault* (1901) 166 Mo. 20, 65 S. W. 1003; *Stewart v. Jones* (1909) 219 Mo. 614, 118 S. W. 1; *Barnard v. Keathley* (1910) 230 Mo. 209, 224, 130 S. W. 306. The court refused to apply the statute in *Sikemeter v. Galvin* (1894) 124 Mo. 376, 27 S. W. 551; and in *McQueen v. Lilly* (1895) 131 Mo. 17, 31 S. W. 1043. In *Cabbage v. Franklin* (1876) 62 Mo. 364, the validity of the partition was not in issue and the testator's words do not appear; but the court said *obiter* that "a partition cannot be made in contravention of a will. Indeed, if the contrary was held, there would be no use in our statutes allowing a testator to make a will." This extreme statement seems nothing short of absurd. In *Lilly v. Menke*, the court spoke of the statute as a "wise enactment."

5. (1901) 166 Mo. 20, 65 S. W. 1003. Cf. *Dee v. Dee* (1904) 212 Ill. 338; *Peterson v. Demonde* (Neb., 1915) 152 N. W. 786.

of the will." Since the statute did not diminish their jurisdiction,⁶ it is conceivable that the jurisdiction a court might yet override a statute to do equity; the statute merely provides for a statutory partition contrary to the testator's method of alienation.⁸ But for the statute the partition would be subject to the inhibitions and other restraints on alienation. Thus, in *Co.,*⁹ where a deed contained an agreement that neither the testator nor their heirs or assigns would institute a partition of the lands, an undivided interest in which was given by the written consent of all persons interested in the lands, the court held the stipulation to be void as "a restraint on the enjoyment and use of the lands. Such a stipulation would be no restraint on alienation, inasmuch as the testator is left free to dispose of their interests in any manner they may see fit. But it is submitted that any stipulation which purports to be truly a restraint on alienation by one of the parties to a partition is truly a restraint on alienation, and should be approached as such. If a stipulation in a deed precludes a partition, it is void. If a mortgage, it is void.¹¹ Public policy demands that land should be alienable, but that they should be subject to a partition on alienation in Missouri have generally been held to be void, but that they are inconsistent with the estates created. But such reasoning begs the question, for the partition itself is the subject of the inquiry. A partition may result in the inability of the testator to partition is the remedy which makes such a partition void as to co-tenants.

The statute forbidding partition contains no limitation. The testator must have some limits. Suppose

6. *Spotts v. Wells* (1833) 18 Mo. 468.

7. But in *Stevens v. De La Vaulx* (1901) 130 Mo. 515, the statute seems to have been regarded as inapplicable in a non-statutory action. It is submitted that it is.

8. It was so spoken of in *Clamogan v. ...*

9. (1892) 110 Mo. 188, 19 S. W. 75, 16 Mo. App. 188.

10. *Wright* (1867) 47 N. H. 396. Cf. *Buschmann v. ...* Supp. 314. An agreement that there shall be no partition may be enforceable. See *Flournoy v. Kirkman*, 189 Mo. 515, 528, 88 S. W. 66. In *Pratt v. ...* civil law sets five years as the limit, for "he who has a ship has a master." Planiol, *Traité élémentaire de droit civil*, 100.

11. Professor Gray agrees that a partition is not a restraint on alienation, "as the undivided interest of the testator is not a restraint on alienation." *Gray, Restraints on Alienation* (2d ed.) § 30. (Neb., 1915) 152 N. W. 786.

12. *Gray, Restraints on Alienation* (2d ed.) § 30.

13. *McDowell v. Brown* (1855) 21 Mo. 189 Mo. 515, 528, 88 S. W. 66. In *Pratt v. ...* 130 Mo. App. 175, 108 S. W. 1099, it was held that the statute was a public policy."

vides that his land shall *never* be subject to partition, into whosever hands it may come. It may well be doubted whether the court would uphold such a restriction. The cases which have arisen involved restrictions limited as to time.¹³

One is lead to ask, what is the purpose of the statute which permits a testator to forbid future partition? Is any protection to the testator himself involved? What public policy underlies the perpetuation of men's control of their property beyond their lives? A stipulation forbidding partition has nothing to do with the determination of the persons who are to enjoy; as the statute cannot be based upon any legislative protection of the devisees themselves. It is conceivable that the object of the statute is to permit testators to protect their devisees against their own folly. In *Stewart v. Jones*,¹⁴ this consideration seems to have been in the mind of the court. It is conceivable also that its object is to protect certain of the devisees against the folly of the others who would like to have partition; but such a purpose of the statute would be outweighed by the general policy of the law to enable any one to use and enjoy what belongs to him. In *Stevens v. De La Vaulx*, the court said that the property belonged to the testator and "he had a right to do with it as he pleased, and those who take of his bounty must take it on the terms he imposes." But there are some restrictions on what a testator may do, and the modern tendency toward curbing the individualism of the nineteenth centruy is gradually extending such restrictions; for instance, a testator cannot provide that land which is devised outright shall not be subject to the debts of the devisee. In other words, there is always an element of public policy involved in any attempt by a testator to control his property after his death, and it is submitted that in the application of the statute in question the court should always bear in mind that public policy demands free alienability of all property, and particularly of all land. Respect for the dead should not eclipse respect for the living.

The question is, therefore, whether the court will liberally construe this statute so as to extend its operation. Will any expression of a testator be seized upon in order to find that he has forbidden a partition of his land? If the foregoing argument be sound, it would seem that while a clear expression of a testator's intention is to be effectuated because of the statute, the court should not be over-zealous ot apply the statute, and should not in a doubtful case seize upon ambiguous phrases and expand them into an expression of a testator's intention that there should be no partition.

13. The time is usually restricted to the life of a devisee or party to a contract. See *Buschmann v. McDermott* (1913) 139 N. Y. Supp. 314. In *Flournoy v. Kirkman* (1916) 192 S. W. 462, ROY, C., seems to have thought such a limited restraint good.

14. (1908) 219 Mo. 614, 118 S. W. 1.

In *Stewart v. Jones*, the testator had provided for a public sale of certain lands upon the death of his widow, and the determination of the persons to whom the proceeds were to be distributed was left entirely contingent upon events which could not have been determined until the death of the widow and the directed sale; in such case the court had no choice, but was bound to find that the testator had forbidden an earlier partition of his land. In *Hill v. Hill*,¹⁵ the testator created life estates in his son and son's wife, and directed that at the death of both, the land be divided equally among his grandchildren; he further provided that if the son should die before his wife, the land should be divided equally among his grandchildren and his daughter-in-law, the son's wife. It will thus be seen that the testator had provided for the division of his property on the death of his son, and if the son's wife survived the son, she was to share in the division, but otherwise not. Manifestly, it could not be determined until the death of the son how many beneficiaries of the division there would be. The quantum of each of the future interests remained contingent until an event which the testator himself had provided for, viz., a division upon the death of the son. On such facts it was easy to find that the testator had "expressed a desire that such real estate be not sold until one or the other of those contingencies arose."

In the principle case we are not told *why* the partition sought would be "in utter disregard of the plain direction of the testator as expressed in his will." The alternative provision for a division of "the proceeds thereof" would seem to have countenanced a partition.¹⁶ But there was an element of contingency in the determination of the future estates, for the heirs of the daughter to whom a life estate was given could not be determined until her death; and the division was to be among the children "or their heirs," so that all the future interests may have been contingent. On this ground the case may be brought within the principle of the decisions in *Stewart v. Jones* and *Hill v. Hill*; but if no such element of contingency had existed, the court would apparently have inferred the same intention that there should be no partition. In the simple case where land is devised to A, to use, occupy and enjoy during his life, and after his death to be divided among B, C and D, it is certainly straining the language to hold that an intention is expressed to preclude partition during the continuance of the life estate; and if the view expressed above as to the public policy behind the statute is to be adopted, a court should hold that a much clearer expression is necessary for the application of the statute. In all three of the recent cases, *Stewart v. Jones*, *Hill v. Hill* and *Shelton v. Bragg*, the element of contingency was present. They may be

15. (1914) 216 Mo. 55, 168 S. W. 1165.

16. The direction for a *division* did not in itself preclude partition. *Chouteau v. Paul* (1833) 3 Mo. 260.

distinguished on that ground. *Shelton v. Bragg* may also be distinguished in that the testator was devising his *home place* to his daughter, apparently in order that she should make it her home during her lifetime; but since the daughter was one of the plaintiffs seeking partition, this reason was not controlling. Perhaps a supposed sentimental desire that the homestead should continue in the family was the cause of the court's willingness to find a direction that no partition should be made during the existence of the life estate. The validity of such a reason may well be questioned when it is weighed against the public interest in the free alienation of all lands.

It is to be hoped that when the question again arises the court will indicate a disposition to construe narrowly the provisions of a will which are relied upon as indicating an intention that no partition should be made. True, it is not for the court to question the policy behind the statute; but it is the proper function of the court to weigh the interests which are involved in its application. Where a statute clearly encroaches on public interest it is the part of the judiciary to confine its application within narrow limits. It is submitted that this statute should be applied only when a will contains a *clear and unequivocal* expression of the testator's intention that no partition should be made. It is to be regretted therefore that in *Hill v. Hill* and *Shelton v. Bragg* there is no weighing of these considerations. Since *Shelton v. Bragg* may be rested on the ground that the existence of the contingent remainder prevented any partition, its future influence as a precedent ought to be slight.

MANLEY O. HUDSON

Equitable Servitudes in Missouri¹

SPECIFIC performance of restrictions upon property before *Tulk v. Moxhay*. Before the decision in *Tulk v. Moxhay*² a contract not to use land in a particular manner was treated by equity courts in the same way as were other negative contracts; if the plaintiff was so injured in the enjoyment of his own land that damages at law did not furnish an adequate remedy, equity would specifically enforce the contract by granting an injunction against the promisor.³ The right thus to control the use of the property in the hands of the promisor can hardly be classified as other than a property right,⁴ but since it was enforceable only against the promisor it was a property right that could be easily destroyed by any alienation of the property and therefore was of relatively small value.

Tulk v. Moxhay. In *Tulk v. Moxhay* the plaintiff, who was the owner of a piece of vacant ground in Leicester Square and

¹This article, without special reference to Missouri law appeared in the December, 1917, number of the *Michigan Law Review* and is reprinted here by the courtesy of the editors of that review. The substance of the article will also appear in a forthcoming book on Equity.

²(1848) 2 Phillips 774. Altho *Tulk v. Moxhay* is the leading case on the subject, the point had already been decided in *Whatman v. Gibson* (1838) 9 Simons 196. It was a sale of lots under a building scheme and the restrictions were mutual. The court did not say anything about unjust enrichment but merely pointed out the advantage to all the proprietors of preserving the residential character of the neighborhood. The case of *Mann v. Stephens* (1846) 15 Simons 377 also antedates *Tulk v. Moxhay*; it varies in facts from *Tulk v. Moxhay* only in that the assignee entered into a similar covenant with the original covenantor. The reasoning of the court is not reported.

³*Martin v. Nutkin* (1723) 2 P. Wms. 266 (promise not to ring a bell); *De Wilton v. Saxon* (1801) 6 Ves. 106 (not to break up mowing land).

⁴For example, it would logically pass on the plaintiff's death to his heir rather than to his executor.

also of several of the houses forming the square, sold the vacant piece to one Elms, the deed containing a covenant by Elms that he, his heirs and assigns would keep the piece of ground in its then state, uncovered with any buildings, etc. The piece of land passed by several mesne conveyances into the hands of the defendant whose purchase deed contained no similar covenant with his vendor, but he had notice of the original covenant when he made his purchase. The covenant did not run at law against the transferee of Elms because it was not connected with an easement; furthermore, there was not only no common law property right but there was not even a contract right against the defendant, because the defendant had made no such covenant with any one. The defendant having manifested an intention to alter the character of the land and having asserted a right to build thereon, the plaintiff sought and obtained an injunction against his doing so. Such a right as equity declared belonged to the plaintiff as against the defendant in this case was formerly called an equitable easement;⁵ It is now more common to call it a covenant running with the land in equity.⁶ Since such restrictive agreements are recognized by equity as creating property rights in chattels as well as in land, while the common law recognizes no easements or covenants as giving property rights in chattels, it avoids confusion and misapprehension to call them by the more general term of equitable servitudes.

Argument of the court in Tulk v. Moxhay. The court in *Tulk v. Moxhay* seemed to rest their decision on the ground that if such a right were not recognized and enforced there would be

"At common law there were five kinds of rights which one might have in the land of another, i. e., rights which could be enforced against the present or any future owner of the land: (a) legal charges, (b) natural rights, such as rights of adjacent and subjacent support, (c) easements, (d) profits, and (e) covenants running with the land. Equitable servitudes on land are similar in some respects to common law easements, but there are some points of difference which will be pointed out later in the article.

"In Missouri the more common term seems to be equitable easements. See *Miller v. Klein* (1913) 177 Mo. App. 557, 573, 160 S. W. 562. In *Zinn v. Sidler* (1916) 268 Mo. 680, 689, 187 S. W. 1172 the court said: "to create the limitation on the fee herein contended for, a covenant must have been created, and it is not material whether it is termed an equitable easement.....or a servitude or a restrictive covenant."

unjust enrichment at the expense of the plaintiff. Where the parties in the different transactions after the purchase and covenant by Elms supposed that the restriction was binding on transferees and fixed the price of the property accordingly, unjust enrichment of the defendant would result if the restriction were not enforced against him. And where those same parties supposed that the restriction was not binding on transferees and fixed the price according to that understanding, unjust enrichment would result to the covenantor if the restriction were enforced against the defendant. On the other hand, where there is no misapprehension by the parties as to the legal rule there is no unjust enrichment of any one because the price of the property will be fixed according to the enforceability or non-enforceability of the restriction. Consequently the decisions enforcing equitable servitudes against transferees can be rested on the doctrine of unjust enrichment only in the rather abnormal case where the parties were mistaken as to the law. Oddly enough, it has been the orthodox doctrine—now happily disappearing—that equity would give no relief against a mistake of law.⁷ At the present day courts usually pay no attention to the question of unjust enrichment in restrictive agreement cases.

A decision which shows that unjust enrichment is not the basis of equitable servitudes is that of *Rogers v. Hosegood*.⁸ In that case it was held that a transferee of the covenantor was entitled to enforce an equitable servitude on the defendant's property tho the plaintiff knew nothing of the restriction when he bought his property from the covenantor.

Real basis of Tulk v. Moxhay. The court in *Tulk v. Moxhay* reasoned in a circle. Whether there was unjust enrichment of the defendant at the expense of the plaintiff depended upon the extent of the plaintiff's right; i. e., upon whether the plaintiff could enforce the restrictive agreement against only the cove-

⁷The usual reason given for denying relief was that everyone was presumed to know the law—an unfortunate misstatement of the rule that ignorance of the law does not excuse one who has in some way incurred a *prima facie* legal liability; for example, by committing a crime or tort or a breach of contract. The rule should not be applied to one who has incurred no such liability but seeks as plaintiff to be relieved from the consequences of his error.

⁸(1900) 2 Ch. 388.

nantor or whether he could also enforce it against the transferees of the land. Tho the reasoning in *Tulk v. Moxhay* is unsound the decision has been followed with practically no adverse criticism and we must therefore find some other reason for it so that we may fit it in with other parts of the legal system. This reason is found in the inadequacy of the common law with reference to rights in another's land,⁹ together with the almost total lack of governmental supervision of building in Anglo-American countries. Tho it might be much better to have municipal control of the use of land than to enforce restrictions imposed by private individuals, such control by private individuals has on the whole been beneficial in the last half century's rapid growth of cities.¹⁰

Who are bound by equitable servitudes? A common law easement or profit was enforceable against any successor in title tho he paid value in good faith.¹¹ But like other equitable rights the benefit of an equitable servitude may not be enforced against

*The attitude assumed by Missouri courts toward the creation of equitable servitudes has been stated as follows: "We concede that in disposing of this question we must resolve any doubt in favor in the free use of property. The law prefers that the use of land in any lawful mode shall be unhampered by restrictive covenants; and, therefore, courts decline to extend the stipulation limiting the use beyond the clear meaning of the instrument when construed by the aid of the circumstances surrounding its execution.....But all courts profess to give effect to all the plain intention of the parties in imposing such restrictions, and should live up to their profession in good faith instead of seeking ingenious subtleties of interpretation by which to evade restrictions." *Sanders v. Dixon* (1905) 114 Mo. App. 229, 252, 89 S. W. 577.

¹⁰The common law rules with reference to such rights were quite rigid. For example, covenants running with the land bound only those who succeeded to the estate of the covenantor and could be created only where there was privity of estate; in this connection privity of estate was said to exist where there was an easement of profit or where there was the relation of grantor and grantee or that of lessor and lessee. Covenants running with the land usually occurred in leases. The most common ones running with the land against transferees were covenants to pay rent, to repair, to rebuild, not to use premises in a certain way, and not to assign the lease; those running with the land against the lessor's transferees were covenants to rebuild and covenants to renew the lease. In England covenants probably do not run against the transferee except in case of landlord and tenant. Tiffany, Real Property § 344.

¹¹Easements and profits are, however, generally required by modern

a *bona fide* purchaser.¹² Tho a common law covenant running with the land was enforceable only against one who succeeded to the estate of the covenantor, there is no such limitation upon the enforcement of equitable servitudes. In *Abergarw Brewery Co. v. Holmes*¹³ there was a covenant in a mortgage not to buy wines, beers, etc., from any one except the mortgagee; the restriction was enforced against an under-lessee with notice,¹⁴ on the ground that it was the intention of the parties to bind every one claiming under the mortgagor. In order to protect the defendant in such a case the decree would of course be made conditional upon the mortgagee's complying with his promise to furnish the liquor.

It has long been considered as settled that one who obtained title from a trustee by adverse possession is entitled to hold it against the *cestui que trust* even though he knew of the trust.¹⁵ On the other hand, one who obtains title by adverse possession of property subject to an equitable servitude does not thereby destroy the servitude even tho he had no notice of it.¹⁶ The only way in which he can get rid of the servitude is by getting a release or by violating it and having the Statute of Limitations

registry acts in this country to be recorded; hence, in the absence of such a record, the *bona fide* purchaser will be protected. *Armor v. Pye* (1881) 25 Kan. 731; *Taylor v. Millard* (1890) 118 N. Y. 244.

¹²Independent of the recording acts, common law rights were enforceable against everyone while equitable rights were not enforceable against *bona fide* purchasers. But wherever the registry statutes apply there is a new line of division; if the right, whether common law or equitable, is recorded according to the statutory provisions, it is enforceable against all; if it is not so recorded, it is not enforceable against *bona fide* purchasers or attaching creditors. It has been generally held that the registry statutes allow and therefore require the recording of equitable servitudes; where, therefore, they have been properly recorded they are enforceable regardless of actual notice. See 18 Harv. Law Rev. 535. *Semple v. Schwars* (1908) 130 Mo. App. 65, 72, 109 S. W. 633.

¹³(1900) 1 Ch. 188.

¹⁴If he had not had notice, *aliter*; *Carter v. Williams* (1870) L. R. 9 Eq. 678.

¹⁵*Wych v. East India Co.* (1734) 3 P. Wms. 309.

¹⁶In *Re Nisbet and Potts' Contract* (1906) 1 Ch. 386. It is not clear whether the court did or did not regard notice as material. It should have been regarded as immaterial. See 18 Harv. Law Rev. 608.

run in his favor.¹⁷ The reason for the distinction seems to be this: the holder of the equitable servitude is not interested in the ownership of the servient property but merely in the way the property is used; hence his rights have not been infringed till the property is used in a way inconsistent with the servitude. Or, to state it differently, while it is a breach of trust for the trustee to convey the trust property to any one without the consent of the *cestui que trust* or an order of court because he owes a fiduciary duty to protect and administer the property for the *cestui*, the holder of property subject to an equitable servitude is not a fiduciary to that extent; he may alien freely except that he must not destroy the servitude by conveying to a *bona fide* purchaser for value.¹⁸ *A fortiori*, one who has disseised the owner of the servient property but has not yet acquired title is bound by the servitude.¹⁹

Influence of Tulk v. Moxhay on promisor's common law liability. Indirectly the decision in *Tulk v. Moxhay* has apparently affected the promisor's common law liability. In order to make it clear that the parties intended that the restriction should bind transferees it is now usual for the promisor to promise not only for himself but also for "his heirs, executors, administrators and assigns". It seems now to be assumed that this form of undertaking not only has the effect of making the restrictions enforceable in equity against transferees but also of making the promisor himself liable at common law for any violation of the restriction by transferees.²⁰ But a subsequent transferee with

"In this respect the holder of the equitable servitude is treated just as if he had a common law easement of profit.

"His position is similar to that of the owner of land subject to an equitable charge. The position of an unpaid vendor who has a right to specific performance is also analogous.

"*Mander v. Falcke* (1891) 2 Ch. 554. The court mentions the fact that he had notice; since he paid nothing for the land it would seem that he ought to be bound even if he had not had notice.

"*Hall v. Ewin* (1887) 37 Ch. D. 74, *semble*. Even before *Tulk v. Moxhay* there was nothing to prevent a promisor from undertaking to be liable for acts done by his transferee; but at any time it would seem that the promise should not be construed as including such an extensive undertaking in the absence of clear evidence of intent. The mere fact that he promises "for his executors and administrators" ought not to be conclusive because the phrase may have been used as a mere form; his

notice who does not bind himself by contract with reference to the servitude is liable at common law for infringements by his alienee only if he authorizes such infringements.²¹

Who may enforce equitable servitudes. In determining the questions as to who may enforce equitable servitudes, equity will usually carry out the intentions of the parties,—either express or implied from all the circumstances of the case. While it is usually the intent to benefit not only the promisee as present owner of land in the vicinity, but also to benefit any future owner of such land, the parties may intend that the restriction be of less duration. In *Renals v. Cowlishaw*²² the devisees in trust for the sale of a mansion house and residential property known as the Mill Hill estate and of certain pieces of land adjoining thereto, sold and conveyed two of these adjoining pieces of land to one Shaw, who covenanted, among other things, that the property should be used for private dwellings only and not for any trade or business. The conveyance did not state that the covenant was for the protection of the residential property or make any reference to the other adjoining pieces of land. The same

executor or administrator, of course, would be responsible in any event for a breach committed by him while he held the land. In *Clark v. Devoe* (1891) 124 N. Y. 120, a deed from the defendant of a lot in New York City, after reciting that the grantee was the owner of an adjoining lot, contained a covenant on his part, "for himself, his heirs, executors, administrators, and assigns . . . that he will not erect or cause to be erected, on said lot, any building which shall be regarded as a nuisance, or which shall be occupied for any purpose which may render it a nuisance". The defendant conveyed the adjoining lot to X by a deed without any restriction; X erected a building which was used as a livery stable. In an action on the covenant for damages the court held that the covenant should not be so construed as to make the defendant liable for the act of X, because of the "serious result to the grantor with but slight benefit to the grantee". The *dictum* of the court that the covenant did not create an equitable servitude so as to bind transferees is, however, unsound; instead of requiring clear language to make the restriction enforceable by injunction against transferees, it would and should take clear language to limit the duration of the restriction to the time that the covenantor is owner of the property, because of the comparatively small value of a restriction thus limited.

²¹*Hall v. Ewin* (1887) 37 Ch. D. 74.

²²(1878) 9 Ch. D. 125. See also *Badger v. Boardman* (1860) 16 Gray 559.

trustees also sold other pieces of land adjoining the Mill Hill estate, similar conveyances being made. The trustees later sold and conveyed the Mill Hill estate to Bainbrigg who died, and his devisees in trust sold and conveyed to the plaintiff. The pieces of land conveyed to Shaw came by several mesne conveyances into the hands of the defendants who carried on the trade of wheelwrights, smiths, and bent timber manufacturers and had erected a high chimney which emitted thick, black smoke, thus injuring the residential character of the neighborhood. The plaintiff was refused an injunction on the ground that the restriction was not meant to benefit the property, i. e., the subsequent owners, but merely to benefit the covenantees "to enable them to make the most of the property which they retained".

If the intent of the parties was that the restriction should exist only as long as the covenantees should hold the land, the decision seems unimpeachable.²³ But it ought to be pointed out that to refuse to protect the transferees in such a case very largely wipes out the commercial value of the restriction to the covenantee unless the transferee erroneously supposed he would be protected; for if at the time he contracted to buy he knew that he could not as purchaser of the land enforce the restriction, he obviously would pay little, if any, more than if there had been no restriction. The chief value of the restriction, therefore, is merely to keep the premises free till a sale could be made.²⁴ On the other hand, if the intent was clear to limit the duration of the restriction to the period of the trustees' ownership of the Mill Hill estate and the purchasers of the lots thus understood

²³In *Coughlin v. Barker* (1891) 46 Mo. App. 54, 59, one Carpenter conceived the idea of establishing a residential section out of property owned by himself and several other proprietors; while he had this idea in mind, he sold some lots with restrictions; one of the lots is now owned by the plaintiff and another by the defendant. It appeared that his intention in inserting the restrictions was to retain control of the mode of building with the view of carrying out the scheme of improvement; having been compelled to abandon the scheme because unable to get the cooperation of some of the other proprietors, the restrictions were considered as having come to an end.

²⁴This might be of sentimental value to the occupants, and safeguard their own comfort during their occupancy.

it and bargained accordingly they are entitled to be free from the restriction the moment the trustees convey the property.²⁵

The shift in the basis of equity jurisdiction against the promisor. In the restrictive agreement cases before *Tulk v. Moxhay* the equity courts based their jurisdiction upon the threatened injury to the promisee's enjoyment of his own land in the vicinity and upon the inadequacy of the common law remedy to compensate for such an injury; and in *Tulk v. Moxhay*, where the court assumed without argument that they would have had jurisdiction to enjoin the promisor, there was such threatened injury. Since *Tulk v. Moxhay*, however, there has been a change of attitude upon the part of the courts that is none the less curious because probably unconscious. In *Peck v. Conway*²⁶ the master found as a fact that the violation of the restriction "would be no appreciable damage or injury to the plaintiff's premises". In discussing this, the court said: "Such an act of the defendants would be against the restriction by which they are bound, and a violation of the rights of the plaintiff, of which she cannot be deprived, because in the judgment of others it is of little or no damage". In other words, the court apparently regarded the plaintiff as being substantially in the same position as if she had bargained for the fee instead of merely for the power to control the use of the land. That is, if she had contracted to buy the fee it would of course be no defense to a suit for specific performance that the plaintiff would be as well or better off without the land; the fact that it is land is a sufficient reason in itself. Similarly, having bargained for a restriction on the land, she is now considered as having bought an interest in the land and the fact that she would not otherwise be damaged if she did get specific performance is no longer considered important.²⁷

"If the restriction had been thus limited in duration, the lot purchasers might have paid more than they would if the restriction was not so limited but whether they paid more or less has no bearing on the enforceability of the restriction.

"(1876) 119 Mass. 546.

"That the plaintiff need not show that the breach caused any damage to his own land in the vicinity seems to be well settled in Missouri. In *Hall v. Wesster* (1879) 7 Mo. App. 56, 62, the court said: "The objection may be founded on the merest whim". See also *Kenwood Land Co. v. Hancock Investment Co.* (1913) 169 Mo. App. 715, 722, 155 S. W. 861; *Sanders v. Dixon* (1905) 114 Mo. App. 229, 240, 89 S. W. 577.

In other words, she is considered as being the equitable owner of an interest in the servient land from the moment the restriction is intended to become operative.

May there be an equitable servitude in gross? If the covenantee need not show any threatened injury to his own premises in order to get an injunction, but need only to show that he has bargained for a restriction on the promisor's land, is it necessary that the promisee should have any land in the vicinity which might be benefitted? In *Van Sant v. Rose*²⁸ the plaintiffs had sold to the defendant Frank Rose a lot with a restriction against erecting a flat or tenement building on the premises; the defendant Frank Rose conveyed the premises to his wife, Alvida Rose, and both defendants were proceeding to erect a flat building. In answer to a bill for an injunction the defendants set up that the plaintiffs did not at the time of filing their bill or for a long time prior thereto own other property anywhere in the vicinity or neighborhood that would be affected by a breach of the covenant. In giving the injunction the court argued that the purchaser presumably paid a less price because of the restriction and therefore the plaintiff ought to be allowed to enforce it to prevent the defendants from being unjustly enriched; and that the plaintiff's motive in creating and attempting to enforce the restriction was of no importance. If this reasoning²⁹ were followed to its logical conclusion the plaintiffs would have been able to enforce a restriction even tho they had never owned any land in the vicinity except that which they sold to the defendant Frank Rose,³⁰ indeed, even if the plaintiffs had never owned any land whatever but had bargained with the defendant in some

²⁸(1912) 170 Ill. App. 572, (1913) 260 Ill. 401.

²⁹While this reasoning is open to criticism, the decision might conceivably be supported on the ground that the plaintiff in requiring the covenant and in suing for an injunction intended to represent and did represent the property owners in the vicinity and that the injunction was given to protect them. No hint of this appears in the case.

³⁰In the supposed case, as in the actual case of *Van Sant vs. Rose*, the purchaser probably paid a less amount for the lot because of the restriction, but how much is probably uncertain. If the injunction were refused, would it be possible for the promisee to force the defaulting promisor to make good this deduction in a suit in quasi-contract? It would seem that this ought to be allowed though the Illinois Court of

other way³¹ for the restriction. Whether the equity courts will take these last two steps and recognize to the full the doctrine of equitable servitudes in gross³² remains to be seen. The decision in *Van Sant v. Rose* is a striking example of the tendency of equity in the United States to become mechanical.

While one having an estate in possession in the dominant property can get an injunction without showing any damage to such property³³ it has been held that one who has an estate in remainder or reversion after a life estate and is not the promisee must show that the breach would cause injury to his estate in order to get an injunction.³⁴ This is analogous to common law protection of property rights; a person in possession may bring trespass for a violation of the possession and recover judgment without proving any damage; the remainderman must bring an action on the case and prove damage to his estate in the land in order to recover. If the remainderman were also the promisee, he would not, of course, be under the necessity of showing any such damage if *Van Sant v. Rose* should be followed.

Equitable servitudes attaching to after acquired property. In *Lewis v. Gollner*³⁵ one Gollner bought a lot in a residential sec-

Appeals in *Van Sant v. Rose* said: "there can be no adequate recovery at law"; the uncertainty of the amount ought not to be considered an insuperable obstacle to such relief. And if he can get such relief, is not this an argument against allowing the injunction to one who no longer has any economic interest in the neighborhood to be protected?

"If the defendant has bargained for a cash payment, the plaintiff's right in quasi-contract seems clear.

"May the same equitable servitude be treated as both appurtenant and in gross? For example, suppose that in *Van Sant v. Rose* the plaintiffs at the time of the sale to Frank Rose had other property in the vicinity which they intended to protect by the restriction; later they sell this other property to X who does not wish to enforce the restriction; may the plaintiffs do so? In such case it might well be said that the plaintiff should not be entitled because if the defendant should be enriched it would be at the expense of X and not of the plaintiffs. But suppose that the promise was made expressly for the benefit of the plaintiffs' other land and also for the benefit of the plaintiffs personally? If we follow the reasoning of *Van Sant v. Rose* it is difficult to see how the plaintiffs could be denied an injunction.

³¹*Dickenson v. Grand Junction Canal Co.* (1852) 15 Beav. 260.

³²*Johnston v. Hall* (1856) 2 K. & J. 414.

³³(1891) 129 N. Y. 227.

tion, intending to erect a tenement building; the plaintiff, representing persons who owned residences in the neighborhood, sought to buy him out and did buy him out, for the sole purpose of saving the neighborhood from flats. The plaintiff paid Gollner \$6,000 more than Gollner had agreed to give for the lot, the latter agreeing that "he would not construct or erect any flats in plaintiff's immediate neighborhood or trouble him any more". Immediately afterward Gollner bought a lot diagonally opposite his first purchase and began erecting a seven-story flat. Plaintiff's attorney threatened action and one of the material-men refused to continue to supply him further, so Gollner sold and conveyed the premises to his wife who took with knowledge of all the facts and with the intention of protecting her husband. The plaintiff sought an injunction against Gollner and his wife; the lower court refused to give it but this was reversed by the upper court. It is to be observed here that at the time the contract was entered into, the defendant Gollner had no land to which an equitable servitude could attach and consequently there was, strictly speaking, no equitable servitude at that time. The court seemed to think that the contract created such a situation between the parties that an equitable servitude came into existence the moment that Gollner acquired a piece of land in the immediate neighborhood and would therefore be enforceable against a purchaser of the land with notice of the facts. This is somewhat analogous to the creation of a trust of after acquired property.³⁶ The actual facts of the case did not require such reasoning; it was clear that Gollner's wife was colluding with him to help him escape the consequences of his contract and even if the obligation of Gollner be considered as merely personal, damages at law being inadequate, the court properly enjoined the wife as well as Gollner. But if Gollner transferred to a stranger who had no intent to aid Gollner to evade his contract but did know the facts, such a transferee could be enjoined only on the ground suggested by the court.

Restrictive agreements as to a business. Tho the great bulk of equitable servitudes consist of restrictions placed on one piece

³⁶*Pratt v. Tuttle* (1884) 136 Mass. 233.

of land, for the benefit of another piece of land,³⁷ they may be imposed for the benefit of a business and if so intended the benefit will pass to the assignee of the business.³⁸ Similarly, the benefit of a personal covenant not to compete with the promisee in business will pass to the assignees of the promisee, if so intended.³⁹ On the other hand, the restriction may be enforced against the assignees of the covenantor's business. In *Wilkes v. Spooner*⁴⁰ X sold to the plaintiff his business of general butcher, covenanting not to establish a rival business within three miles. X also conducted a pork business at a nearby shop which he held on lease. This lease X surrendered in order that his son, the defendant, who bought the pork business with notice of this covenant, might get a new lease and set up a business to compete with the plaintiff's. The real reason for enjoining the defendant was that he was the assignee of the father's business—not that he happened to occupy the same building; tho the court seemed to put it on the latter ground, it is difficult to see how X, having only a term for years, could create an equitable servitude on the land which would outlast his lease.

The formality essential to the creation of equitable servitudes. Altho equitable servitudes are treated as technical property rights; i. e., they are enforced tho the plaintiff would suffer no damage to other land by a breach,—no particular formality is required for their creation. Thus not only is a seal not necessary⁴¹ but there is a conflict of authority as to whether any written memorandum at all is necessary to comply with the Statute of Frauds.⁴² Furthermore, it is not important whether

"This is a convenient figure of speech; legal rights and obligations may strictly be predicated only of human beings.

³⁷*Abergarw Brewery Co. v. Holmes* (1900) 1 Ch. 188.

³⁸*Francisco v. Smith* (1894) 143 N. Y. 488. As the court pointed out, since the benefit passed to the assignee of the business, no injunction can be granted if the business is discontinued; but a discontinuance does not put an end to the right but merely suspends the enforcement, so that if the business is later resumed the covenantor can then be enjoined. *Clegg v. Hands* (1890) 44 Ch. D. 503.

³⁹(1911) 2 K. B. 473, 24 Harv. Law Rev. 574.

⁴⁰*Dorr v. Harrahan* (1869) 101 Mass. 531.

⁴¹See Browne, Statute of Frauds (4th ed.) § 269; but see 5 Harv. Law Rev. 278: "If the acts and the land are stated in writing the court

the restrictions take the form of covenants,⁴³ reservations, or conditions.⁴⁴

But altho form may not be essential it is as a practical matter very important in drawing up instruments containing restrictions that express stipulations be made. If the covenantee wishes to make certain that his transferees may take advantage of the restriction, the safest way is to have an express provision in the deed that it is for the benefit of the land; if he fails to do this, it will then become a question of construction for the court. In *Tallmadge v. East River Bank*⁴⁵ it was held that if the sale was made with reference to a plat showing the restriction, that was enough.⁴⁶ And in *Peck v. Conway*⁴⁷ and *Barrow v. Richard*⁴⁸ it was decided that if on a fair construction of the whole instrument an intention to benefit the land appeared, that was sufficient.⁴⁹ If the seller intended to sell all the property and not retain any himself, this fact tends strongly to show that the restriction was meant to benefit the future owners of the land.⁵⁰

considers the statute satisfied, and will gather the other terms of the restriction by reading the writing as a whole in the light of surrounding circumstances".

⁴⁴*Peck v. Conway* (1876) 119 Mass. 546.

⁴⁵*Parker v. Nightingale* (1863) 6 Allen 341; 5 Harv. Law Rev. 277.

⁴⁶(1862) 26 N. Y. 105.

⁴⁷In *Zinn v. Sidler* (1916) 268 Mo. App. 680, 187 S. W. 1172, one Wright had laid out and platted thirty-one acres in lots, acknowledged the plat and had it recorded; across the lots and blocks on this plat checked or broken lines were drawn designated as "building lines"; the court held that this was insufficient evidence of Wright's intention to impose restrictions, evidently agreeing with the defendant's contention that the lines constituted merely a suggestion to the future owners of property in the addition. For a comment upon this case, see 15 Law Series, Missouri Bulletin, 19.

⁴⁸(1876) 119 Mass. 546.

⁴⁹(1840) 8 Paige 351.

⁵⁰5 Harv. Law Rev. 278: "The ownership and character of buildings in the neighborhood, plans, building schemes, the existence of similar restrictions upon other lots, even parol agreements among neighbors may be shown as bearing upon the probable intention of the contracting parties".

⁵¹See the discussion of mutual covenants, *post*. And see *Nottingham Co. v. Butler* (1886) 16 Q. B. D. 778. In *Meriweather v. Joy* (1900) 85 Mo. App. 634, the vendor at the time of the sale to the defendant, had no

Whether equitable servitudes may require affirmative action. With the exception of the spurious common law easement of fencing, common law easements require no action on the part of the owner of the servient property.⁵¹ An equitable servitude, on the other hand, may impose a duty to act tho the court may as a practical matter refuse relief.⁵² If the act is of such a nature as to require little or no supervision, enforcement will be decreed; e. g. in *Whittenton Mfg. Co. v. Staples*,⁵³ where the covenant was to pay the grantor or his assignee one-fifth of flowage damages caused by a reservoir dam. On the other hand, if the act is such as to require a great deal of supervision, equity will usually refuse relief⁵⁴ as a matter of the balance of convenience

property fronting on the street, having already conveyed what he had there to his grandchildren without restriction; the court very properly argued that these circumstances tended to show that he meant the building line restriction to protect the grandchildren, of whom the plaintiff was one.

⁵¹Tiffany, Real Property § 312.

⁵²Because of the difficulty of supervision and the interference with the personal liberty of the defendant. It is a question to be decided as a matter of the balance of convenience. See 5 Harv. Law Rev. 278, 279.

⁵³(1895) 164 Mass. 319. See also *Atlanta, etc. Ry Co. v. McKinney* (1906) 124 Ga. 929, in which a covenant to convey water to the covenantee's residence was enforced against the covenantor's assignees. In *Clegg v. Hands* (1890) 44 Ch. D. 503, a covenant by a lessee to buy beer only of the lessor was indirectly enforced in favor of the lessor's assignees by enjoining the lessee from buying beer elsewhere. It thus combines the peculiar principles of both *Tulk v. Moxhay* and *Lumley v. Wagner* (1852) 1 De Gex, M. & G. 604. See 14 Harv. Law Rev. 301.

⁵⁴The question of giving affirmative relief may also arise where the defendant has already violated the restriction by erecting a building before the plaintiff asks for relief; if the removal of the building would cause damage to the defendant wholly disproportionate to the damage caused to the plaintiff by the breach, the court will exercise its discretion in refusing such relief. In *Kenwood Land Co. v. Hancock Investment Co.* (1913) 169 Mo. App. 715, 155 S. W. 861, the defendant had violated a restriction by building a duplex house; the court held that the proper relief was not to order its removal but to decree that it should be occupied by only one family until the restriction should expire at the end of fifteen years. In *Sanders v. Dixon* (1905) 114 Mo. App. 229, 254, 89 S. W. 577, the court held that the defendant should have the opportunity to alter the building so as to make it a single residence before ordering him to remove it; and in *Thompson v. Langan* (1913) 172 Mo. App. 64, 154 S. W. 808, an order for the removal of a building erected

unless the hardship on the plaintiff would be very great if relief were denied.⁵⁵

Mutual covenants in general building schemes. Another illustration of the non-technical way in which equitable servitudes may be created is shown in the rules applying to mutual covenants in general building schemes. In *Nottingham Patent Brick and Tile Co. v. Butler*⁵⁶ thirteen lots were put up at auction, subject to certain sale conditions as to the use of the land, which were also expressed in the deeds of conveyance to the various purchasers. It was held that since the grantor intended to sell and did sell the whole property, the restrictions were evidently meant to benefit each lot as against all the others, and equity would effectuate this intention.⁵⁷ In *Barrow v. Richard*⁵⁸ it did not appear that the vendor intended to sell all his property in the vicinity, but in each of the conveyances which he made there was included a condition against the property being used for "any other manufactory, trade, or business whatsoever which should or might be in anywise offensive to the neighboring inhabitants". This was held to be sufficient to show an intention to benefit each of the lots sold⁵⁹ against the others. The court in this case

for a hotel was denied if it could be so changed as to comply with the restriction. In *Forsee v. Jackson* (1915) 192 Mo. App. 408, 182 S. W. 783, the defendant had erected a building with a bay window extending nine inches beyond the building line; an affirmative decree for the removal of the bay window was denied because of the great damage it would cause to the defendant. In such a case, it would seem that the court should have given to the plaintiff, in lieu of the injunction, compensation for the plaintiff's equitable property right which is thus confiscated.

⁵⁵*Haywood v. Brunswick Building Society* (1881) 8 Q. B. D. 403 (covenant to keep in repair not enforced against assignee).

⁵⁶(1886) 16 Q. B. D. 778.

⁵⁷The fact that the lots were not sold on the same day and the further fact that some were sold at private sale were held to be unimportant since it was a general scheme. See *Collins v. Castle* (1887) 36 Ch. D. 243. Even if there is no general scheme the restrictions may be mutual, if it can be shown from some other source that the vendor intended the covenant to bind each lot in favor of all the rest. *Doerr v. Cobbs* (1909) 146 Mo. App. 342, 351, 123 S. W. 547.

⁵⁸(1840) 8 Paige 351.

⁵⁹As to whether other "neighboring inhabitants" not purchasers from the vendor, might enjoin as expressly intended beneficiaries of the contract, *quaere*.

admitted that the plaintiff could not recover at law,⁶⁰ and it must be admitted that it would have been difficult if not impossible to have worked out any principle at common law which would allow the purchaser of the lot first sold to enforce against a purchaser of another lot a covenant which was not in existence at the time of the sale of the first lot. Equity, however, is able to and does carry out the intention of the parties⁶¹ by allowing the purchaser of any lot to enforce the restriction⁶² against the

⁶⁰This was before the famous case of *Lawrence v. Fox* (1859) 20 N. Y. 268 which gave a payment beneficiary of a contract a right to sue thereon; but it is at least doubtful whether the present New York law would regard the plaintiff as coming within the principle of that case.

⁶¹See 6 Harv. Law Rev. 290; 12 Col. Law Rev. 159. In *Child v. Douglas* (1854) Kay 560, it is suggested that the later purchasers are assignees from the vendors of the benefit of the covenants made by the earlier purchasers, but this does not explain the obligation of the later purchasers to the earlier. In *Parker v. Nightingale* (1863) 6 Allen 341, it was held that since the vendor was only a dry trustee of the covenants for each of the purchasers he need not be joined. The purchasers would seem to be beneficiaries of the contract rather than *cestuis que trust*, however. That mutual covenants may exist without a sale but merely by agreement between two owners of neighboring property, see *Trustees of Columbia College v. Lynch* (1877) 70 N. Y. 440.

⁶²In *Doerr v. Cobbs* (1909) 146 Mo. App. 342, 351, 123 S. W. 547 the court held that if a senior grantee wished to enforce a restriction against a junior grantee, stronger evidence of intention to benefit him was necessary than in the case where the parties were reversed. "A difference in principle can be discerned between the case of a grantee holding premises under a subsequent conveyance from the common source of title and seeking to enforce a covenant restricting the use of nearby premises, contained in a deed of prior date, from the case of a man who, holding title under a prior grant, seeks to enforce a covenant contained in a deed later than the one under which he claims. The junior grant is supposed to have been made for a consideration enhanced by the circumstance that the use in obnoxious ways of property adjacent to or in the neighborhood of that conveyed had been restrained in previous conveyance; or, to borrow the pungent phrase of Lord Hatherly, in *Child v. Douglas*, Kay 560, the later grantee 'must be said to have bought the benefit of the former purchaser's covenant.' And, as no injustice to the former purchaser will be occasioned by holding him to the observance of the restriction in his deed, it is reasonable to allow any property-owner who bought later from the same vendor, and who will be damaged by a breach of the restriction, to restrain a breach. But the same reasoning does not obtain as widely in favor of permitting a senior grantee of one

purchaser of any other lot.⁶³ In such a building scheme, however, each lot is treated as a unit; hence, if it is later divided, one part of the lot can not enforce against the other part,⁶⁴ but each part may enforce the restriction against any other lot or part thereof or *vice versa*.

While it seems to be an unsettled question whether in the ordinary case a covenant will bind after acquired property of the covenantor,⁶⁵ it has recently been held in a general building scheme case that after acquired property may be bound at least in the hands of a transferee. In *Schmidt v. Palisade Supply Co.*,⁶⁶ X, the owner of land, projected a definite building scheme, including in his project land to which he had no title. He later acquired this land and conveyed a part of it to the defendant, subject to the restrictions of the general plan. It was held that a purchaser of part of the land originally owned could enforce the restriction against the defendant.⁶⁷

lot to insist on a restrictive covenant inserted in a later conveyance of another lot, inasmuch as the covenant to be enforced, was not in existence when the senior grantee bought, and the presumption that he bought in reliance on its protection does not arise naturally. In such an instance it must appear in some manner from the deed to the senior grantee, or *dehors* said deed, that the vendor intended the covenants to bind himself and those who thereafter should derive title from him to property in proximity to the complainants". If there had been a general building scheme, however, there would have been no occasion for making the above distinction because the general scheme would supply the evidence of intention to benefit each lot as against every other lot, regardless of the time of sale.

⁶³Tho equitable servitudes have grown out of the specific performance of contracts, it may be questioned whether it is at the present time necessary for the existence of equitable servitudes that there be any common law contract right against any one. For example, if A has only ten lots and he sells them all at one auction according to a building scheme, it is at least doubtful whether there is any personal liability on any one. If there is not, then the situation is analogous to a conveyance of land with a reservation of a common law easement or of a rent charge.

⁶⁴*King v. Dickeson* (1889) 40 Ch. D. 596; *Barney v. Everard* (1900) 67 N. Y. Supp. 535. See 7 Col. Law Rev. 623.

⁶⁵See *ante*.

⁶⁶(1912) 84 Atl. 807 (N. J.); 13 Col. Law Rev. 77.

⁶⁷It is an interesting question whether X himself would be bound by the general restrictions as to the after acquired land. There seem to be no cases.

Failure of purpose of restriction. Tho the plaintiff may get an injunction without showing damage to his other property, he may be refused preventive relief where it is not possible thereby to secure to the plaintiff the benefit intended. In *Jackson v. Stevenson*,⁶⁸ lots had been sold in 1865 under a general building scheme with restrictions against the use of the lots for trade or business purposes. After 1873 the character of that portion of the city changed from a residential to a business district. In 1891 the plaintiff sought an injunction but was refused because the court's decree could not restore the residential character of the neighborhood, and would therefore be practically futile.

The court, however, did not dismiss the bill but retained it for the sake of assessing damages. This is to be justified only upon the ground that the servitude has not actually come to an end but that it is merely unenforcible because of practical difficulties. The court in *McClure v. Leaycraft*, *supra*, seemed to proceed upon the same theory in suggesting that the plaintiff could recover damages at law. It is difficult to understand this last suggestion because the defendant was not the original covenantor but a purchaser from him; but it is understandable to allow the plaintiff a sum of money in equity as compensation for an equitable property right which the equity court in its dis-

⁶⁸(1892) 156 Mass. 496. See also *McClure v. Leaycraft* (1905) 183 N. Y. 36, 19 Harv. Law Rev. 305. See also *Columbia College v. Thacher* 87 N. Y. 311, where the change had come about after suit brought but before decree. There seems to be an unfortunate tendency in Missouri to deal with this question in a mechanical way. In *Thompson v. Langan* (1913) 172 Mo. App. 64, 83, 154 S. W. 808, the court said: "But it is claimed that the general plan upon which Hamilton Place was laid out and the general object of its creation had been abandoned and that conditions in the neighborhood had changed, and that therefore, all of the restrictions fell in. We considered both of these questions in *Spahr v. Cape*, [1909] 143 Mo. App. 114, 122 S. W. 379, and again in *Noel v. Hill*, [1911] 158 Mo. App. 426, 138 S. W. 364. In the last named case, as here, it was in evidence that on adjoining streets, and across the same street, there were no restrictions, that there were stores and shops across that and on streets running to the north of and bordering on the restricted locality, the restricted section covering but one city block; in short, that outside of the restricted district, business had grown up and the neighborhood had changed. We held in each of the cases, as in others referred to, that these facts did not put an end to the restrictions. We hold,

cretion refuses to enforce.⁶⁹ In *Amerman v. Dean*⁷⁰ the trial court having awarded \$1,500 in lieu of an injunction the upper court ordered that the plaintiff should not get the amount unless she executed to the defendant a release of the servitude.

Public policy against enforcing restriction. A contract not to compete with the promisee may be invalid at law and therefore not enforceable in equity because contrary to public policy⁷¹ in favor of freedom. For the same reason a court of equity may refuse to enforce an equitable servitude. In *Norcross v. James*,⁷²

on the application of those principles to the facts here, that the restrictions here invoked are not removed by reason of any change of conditions". See also *Bohn v. Tyrol Investment Co.* (1913) 178 App. 1, 160 S. W. 588. If the restricted district is small and surrounded by unrestricted territory which is given over to business buildings, it seems of doubtful propriety to continue the enforcement of the restrictions. On the other hand the court is quite right in saying that the mere fact that the restricted lot has become more valuable for business than for residential purposes is not a sufficient reason for denying an injunction. *Noel v. Hill* (1911) 158 Mo. App. 426, 450, 138 S. W. 364; *Spain v. Cape* (1909) 143 Mo. App. 114, 122 S. W. 379.

⁶⁹In *Sanders v. Dixon* (1905) 114 Mo. App. 229, 256, 89 S. W. 577, the defendant contended that the time limit for the restrictions had expired. The court said: "If, in truth, the restrictions have lapsed, there is no cause to alter the building as it stands for it might immediately be converted into a flat without violating the covenant..... If the restrictions have lapsed, the plaintiffs may be entitled to redress for damages sustained from the construction and maintenance of the flats—redress which a court of equity would have power to award as essential to complete justice, in the present case wherein the plaintiffs have shown an equity".

⁷⁰(1892) 132 N. Y. 355.

⁷¹Whether, in order to be valid, restrictions must be reasonable can hardly be said to be settled in Missouri. In *Compton Hill Improvement Co. v. Strauch* (1911) 162 Mo. App. 76, 87, 141 S. W., 1159, the court suggests that they must; on the other hand, in *Miller v. Klein* (1913) 177 Mo. App. 557, 571, 160 S. W. 562, the court said: "It is conceded by both parties that it is not necessary for the plaintiff to make any showing that the restrictions as originally contained in the deeds are reasonable or in the opinion of the court desirable". The latter case is an illustration of the unfortunate tendency to deal with equity questions in a formal, mechanical way. It is at least doubtful whether the economic interest of vendors will prove to be a sufficient safeguard against imposing undesirable restrictions.

⁷²(1885) 140 Mass. 188.

one K conveyed to F a quarry, retaining it. In the conveyance there was a covenant not on the land retained. Plaintiff, a subsequent quarry, sought to have the covenant enforced against the transferee of the surrounding land. On the ground that it would tend to create a monopoly for the plaintiff. Whether, however, the restriction was against public policy ought to be determined on the facts. It is nothing in the report of the case to show that the stone would injure the public,⁷⁴ tho that might be the case, e. g. if the stone were a peculiar sort which could not get on the market. If, however, the stone was easily and cheaply procured by the public, there was no satisfactory reason for refusing relief.⁷⁵

Equitable servitudes upon and for the benefit of the public may be very important for the vendor or the vendee to impose restrictions upon the use of the land by the lessee and his assignees or upon the sale of the land by the purchaser and his assignees. A few such restrictions, thus carrying out the inter-

⁷⁴In *Noel v. Hill* (1911) 158 Mo. App. 426, the defendant contended that the restriction against the use of the land for business violated the so-called rule against perpetuities. The court held that the rule requires that interest in property must vest within a certain time after lives in being at the creation of the interest. The contention that the restriction was invalid was proper because the interests of the grantor and servient tenants are vested at once, just as in the creation of a common law easement. The reason for the decision on this point was that there were no facts to show that the defendant could convey an absolute fee in possession; while the plaintiff could really state an adequate reason; the mere fact that the defendant could convey an absolute fee does not prevent a restriction from being bad within the so-called rule against perpetuities.

⁷⁵In *Burdell v. Grandi* (1907) 152 Cal. 376, the defendant owned a tract of land divided it into lots and conveyed them by deeds containing covenants by the vendors not to sell liquor on the lots; the purpose was to protect his own sale of liquor. The covenants were held void as creating a monopoly. 152 Cal. 376. See also *Brewer v. Marshall* (1868) 12 Cal. 450. See also *Brewer v. Marshall* (1868) 12 Cal. 450.

⁷⁶In the very similar case of *Hodge v. Sloan* (1888) 100 Cal. 450, relief was given; the question of monopoly seemed to be immaterial.

*Murphy v. Christian Press Association Publishing Co.*⁷⁶ the plaintiff bought of the Catholic Publication Society a set of electrotype plates, covenanting that it would not sell plates to any one else, and that it would not sell books at less than a certain price. Later the Society was dissolved and the receivers sold the plates to the defendant who knew of the agreement. The defendant published and sold books at a less price than the Society agreed to sell; the plaintiff was granted an injunction. Here the covenantee was not the business because the defendant did not buy out the business but merely the plates and copyright, so that the dominant property here was the plates sold and the servient property was the plates retained. It is to be observed that the chattels involved here were protected by the copyright law; it is also held that the price of patented articles may be similarly controlled.⁷⁷ It was for a while contended⁷⁸ that the same rules should be applied to proprietary articles such as so-called patent medicines where there was a trade secret involved; but the present tendency is in favor of holding restrictions in such cases invalid.⁷⁹ Where neither statutory nor natural monopoly is involved the public interest in free trade in chattels should *a fortiori* prevent the upholding of such restrictions.

Effect of plaintiff's default or acquiescence. Like other incorporeal property rights, an equitable servitude may be released by the owner of the dominant property and thereby extinguish-

⁷⁶(1899) 38 N. Y. App. 426. See also *N. Y. Bank Note Co. v. Hamilton Bank Co.* (1895) 83 Hun. 593; 20 Harv. Law Rev. 335.

⁷⁷See *Park & Sons Co. v. Hartman* (1907) 153 Fed. 24, and cases cited.

⁷⁸See 17 Harv. Law Rev. 415.

⁷⁹*Dr. Miles Medical Co. v. Park & Sons Co.* (1911) 220 U. S. 373, Price Restriction on the Re-sale of Chattels, by William J. Shroeder, 25 Harv. Law Rev. 59-69. Mr. Shroeder's argument is that while the protection of the statutory monopoly of the patentee and copyright owner extends to the chattels produced thereunder, the natural monopoly of the possessor of a secret exists only so long as the secret is preserved and has no relation to the article manufactured by its use when once it is offered as a subject of commerce; that while the owner of the statutory monopoly gives the benefit of his discovery to the public after a certain period, the owner of a trade secret gives nothing to the public for his protection against fraudulent discovery or disclosure.

ed;⁸⁰ whether the failure of the purpose of a restriction puts an end to the right or merely to the plaintiff's equitable remedy thereon has already been discussed.⁸¹ A plaintiff may, of course, be estopped⁸² by observing without objection the defendant's expenditure of money in violating the restriction, tho it is at least doubtful whether this would bar the plaintiff from objecting to further violations.⁸³ Where the restrictions are mutual a plaintiff may be barred because he has himself violated the restriction upon his own land;⁸⁴ and where a landlord imposed building restrictions upon several tenants for their mutual benefit as well as his own and so failed to enforce them against some of the tenants that the object of the restriction was defeated it was held that he had lost the power to enforce against others.⁸⁵

⁸⁰Tiffany, Real Property § 275.

⁸¹See *ante*.

⁸²In *Hall v. Wesster* (1879) 7 Mo. App. 56, 63, there is a *dictum* that if the plaintiff had known that the defendant was erecting the buildings he might have been estopped. In *Miller v. Klein* (1913) 177 Mo. App. 557, 160 S. W. 562, the court held that mere silence and inaction in allowing other persons to erect flats on adjoining land did not amount to an estoppel unless it amounted to a fraud on the plaintiff. And in *Thompson v. Langan* (1913) 172 Mo. App. 64, 86, 154 S. W. 808, the court took the position that permitting violations by others might show abandonment but not estoppel.

⁸³*Whitney v. Union Ry. Co.* (1858) 11 Gray 359.

⁸⁴*Coates v. Cullingford* (1911) 131 N. Y. Supp. 700; 12 Col. Law Rev. 158. In *Compton Hill Improvement Co. v. Strauch* (1911) 162 Mo. App. 76, 141 S. W. 1159, several plaintiffs sued for an injunction; one of them had violated the restriction but the others had not; it was held those who had not violated the restriction were entitled to the injunction.

⁸⁵*Roper v. Williams* (1822) Turn. & R. 18. See also *Ocean City Ass'n. v. Chalfant* (1903) 65 N. J. Eq. 156 (restrictions against trade or business on Sunday); 17 Harv. Law Rev. 138; 4 Col. Law Rev. 73. This is probably what the court had in mind in *Thompson v. Langan* (1913) 172 Mo. App. 64, 86, 154 S. W. 808, when it said that such a defense amounted to abandonment and not to estoppel; that is, that if the object of the restrictions had thus been defeated, it was not necessary to show that the defendant had changed his position in reliance upon the plaintiff's implied representations.

While mutual restrictions may come to an end by mutual abandonment, a modification of the restrictions may be made by all parties without extinguishing the restrictions.⁸⁶

GEORGE L. CLARK.

*See *Sanford v. Keer* (1912) 80 N. J. 240, where it was held that building a garage on that portion of the lot intended for a dwelling house was not protected by a modification allowing necessary or desirable out-buildings. In *Scharer v. Pantler* (1907) 127 Mo. App. 433, 105 S. W. 668, the grantor sold several lots with a building line restriction of twenty-five feet. Soon afterward the grantor and grantees erected buildings on a fifteen foot line. It was held that this was an abandonment, not a modification, and that the defendant could not be enjoined from erecting a building only five feet from the street.

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NOTES ON RECENT MISSOURI CASES

COURTS—POWER OF COURT TO ORDER INSPECTION OF MACHINERY ON DEFENDANT'S PREMISES. *State ex rel. American Manufacturing Co. v. Anderson*.¹—The relator seeks to prohibit the respondent from enforcing compliance with an order entered by a circuit court in *Zasemowich v. American Manufacturing Co.*, directing that the defendant therein permit the plaintiff and his counsel to enter his premises for the purpose of taking photographs and measurements of certain machinery to be used as evidence in the case. The plaintiff was suing for damages for personal injuries alleged to have been caused by the relator's defective machinery. The Supreme Court quashed the preliminary writ of prohibition it had issued on the ground that the circuit court had the inherent power to make the order in question because that power existed at common law in the *nisi prius* judges and because it had not been abolished by the constitutional provisions forbidding unreasonable searches and seizures.

The early common law conception of a trial as a game in which the litigants were adversaries and the court referee would seem to account for the court's reluctance to compel one of the players to furnish

*In the Service of the Government. ¹(1917) 194 S. W. 268.

evidence for his opponent.² The parties themselves, because of interest, were disqualified from testifying and, unlike the witnesses brought in by subpoena, might more readily be exempted from disclosing any relevant information. As a result of this attitude the ends of justice were defeated in many cases where one of the parties possessed books, documents, or other chattels, the inspection of which was necessary for the making of his opponent's case, and hence litigants out of possession had recourse to courts of equity where the chancellor, operating on the conscience of the party, compelled him to produce the documents or chattels for inspection.³ Thus in *Kynaston v. East India Co.*,⁴ the plaintiff having secured a decree establishing his right to certain tithe-rents the amount of which depended on the value of the defendant's premises, the chancellor issued an order directing the defendant to permit the plaintiff and two witnesses to enter for the purpose of appraising their value. The allowance of bills for discovery aimed at securing certain kinds of information known only to the other party became a common practice in the chancery courts.⁵ In the United States, courts of equity have granted motions for the inspection of the defendant's premises or of chattels in his possession. In *Mutual Fire Insurance Co. v. Grierson*⁶ the court made an order directing the exhumation of the body of respondent's husband for the purpose of inspection where the complainant contended that the deceased had committed suicide. Inspection of the defendant's mine was ordered in *Hensley v. Langton*.⁷ The court refused to compel defendant to produce patterns for stove castings in *Re Sheppard*,⁸ holding that it had not the power in the absence of statute. But as regards the power of a court of equity to make such an order the weight of authority seems opposed to the last mentioned case.⁹

In England, perhaps because of the certainty of relief in equity, there are few cases in which a common law court has been asked to order the production of evidence, other than that of a documentary nature, by one of the parties. The law courts did enter orders compelling a party to produce books and papers, or copies, for inspection, after the practice had grown up in chancery.¹⁰ In an action for work and

²Wigmore, Evidence § 1862; *Anonymous Case* (1702) 3 Salk. 363.

³ *Earl of Macclesfield v. Davis* (1814) 3 Ves. & B. 16.

⁴(1819) 3 Swanst. 278.

⁵*Lewis v. Marsh* (1849) 8 Hare 97; *Atty. Gen. v. Chambers* (1849) 12 Beavan 159; *Bennit v. Whitehouse* (1860) 28 Beavan 119. In each of these three cases, the plaintiff was permitted to inspect the defendant's mine.

⁶(1907) 156 Fed. 398.

⁷(1899) 87 Fed. 178.

⁸(1880) 3 Fed. 12. See also *Johnson Steel Street Rail Co. v. North Branch Steel Co.* (1891) 48 Fed. 191.

⁹*Ruling Case Law* 175; *Culbertson v. Iola Portland Cement Works* (1912) 87 Kan. 529; *Stockbridge Iron Co. v. Cone Iron Works* (1869) 102 Mass. 80; *Reynolds v. Burgess Sulphite Fibre Co.* (1901) 71 N. H. 332; *Thomas Iron Works v. Allentown Co.* (1877) 28 N. J. 77.

¹⁰*Stedman v. Arden* (1846) 15 M. and W. 487. For a history of the growth in the exercise of this power, see the note to *Lester v. People* 41 A. S. R. 388.

labor the trial court made an order directing the defendant to permit the plaintiff and his agents to come upon the premises for purposes of inspecting the work; on appeal, it was held that the court could not make the order because it could not attach the defendant for disobedience thereto.¹¹

In *Hunter v. Allen*¹² a witness refused to produce a watch when requested to do so by counsel; upholding the refusal of the trial court to order him to do so, the Supreme Court of New York declared that neither a party nor a witness could be compelled to produce a chattel in court for inspection upon trial. In *Cook v. Lalance Grossjean Mfg. Co.*¹³ the defendant had been ordered to permit plaintiff to inspect a machine. In an appeal from the order the court said: "Such an exercise of power would be an usurpation of authority to search and inspect the private premises of a citizen in a manner and purpose untolerated by our law." At present a statute¹⁴ confers upon the New York courts the power denounced as a "usurpation of authority."

In Michigan the power of the court to permit an invasion of the defendant's premises for the purpose of securing evidence has been denied.¹⁵ The defendant in *Groundwater v. Washington*¹⁶ contended that the plaintiff's injury was caused by a faulty wagon seat. An instruction which stated, *inter alia*, that plaintiff did not have to produce the seat for inspection in court unless he wished, was held erroneous. That exhumation of a dead body might be ordered if thought necessary by the court, is decided in an early Mississippi case.¹⁷ A *dictum* in *Sullivan v. Moulin*¹⁸ seems to indicate that Iowa recognizes the existence of the courts' power to order an inspection of material on defendant's premises. The right of the plaintiff in a personal injury suit to compel the defendant to give him an opportunity of inspecting the machinery alleged to have caused the injuries was upheld in *Clark v. Tulare Lake & Dredging Co.*¹⁹ by the California Court of Appeals. The court's decision may have been influenced by a statute²⁰ which clothed it with power over every person connected with a judicial proceeding before it.

There are apparently no Missouri decisions directly in point. But an analogy may be found in the question which involves the trial court's power to compel the plaintiff in a personal injury suit to submit to a

¹¹*Turquand v. Guardians of the Strand Union* (1840) 8 Dowling 201.

¹²(1860) 95 Barbour 42.

¹³(1883) 3 N. Y. 332.

¹⁴Laws of New York, 1913, c. 86, p. 152.

¹⁵*Martin v. Eliot* (1890) 106 Mich. 130, 63 N. W. 995 (power to order inspection of horse on defendant's premises); *Newberry v. Carpenter*, (1895) 107 Mich. 567 (power to enter and seize

boiler to be used as evidence in criminal prosecution against a third party, defendant's agent).

¹⁶(1896) 92 Wis. 56.

¹⁷*Granger's Life Insurance Co. v. Brown* (1879) 57 Miss. 308.

¹⁸(1901) 113 Iowa 76.

¹⁹(1910) 14 Cal. App. 414, 112 Pac. 564.

²⁰Cal. Code of Civil Procedure, Sec. 128.

physical examination. A long line of cases has affirmed the existence of that power, although it was at one time denied.²¹ The Supreme Court of the United States in the leading case of *Botsford v. Union Pacific*²² decided that the plaintiff could not be ordered to submit to a physical examination. Mr. Justice Brewer wrote a vigorous dissenting opinion in which Mr. Justice Brown concurred. The slight weight of authority, however, seems to be with the Missouri view.²³ If our courts feel justified in compelling a litigant to submit his person to an examination in the interests of justice, it would seem to follow that an invasion of a litigant's property for the same reason is justifiable.

With this in view, the Supreme Court in the principal case suggests as the basis for the decision an implied agreement by the defendant, as an employer, to open to the inspection of the plaintiff, as an injured employee, the instrument or condition causing the injury, the plaintiff being under a corresponding obligation to permit an examination of his person at the defendant's request. But in asserting the power to compel an examination of the plaintiff's person, the courts have not confined the doctrine to cases in which the plaintiff was suing his employer for personal injuries.²⁴ Such a restriction, it is submitted, would be an unfortunate one; nor, need it be made if we look beyond the fiction of an implied agreement for the basis of the defendant's duty. Mr. Wigmore points out the existence of a duty owed by every man to give the public his evidence; he takes the position that since the individual is under a duty to disclose facts within his knowledge in furtherance of justice, no distinction can be made between the "mental impressions preserved in his brain—and the chattels and premises within his control."²⁵ Legislation making parties compellable to testify has been almost universal, indicating a departure from the common law conception of litigation. The statutory provisions making it possible for one of the parties to use his adversary as a witness seems a recognition, if not a creation, of a duty upon parties to furnish evidence, as well as upon other individuals who were always subject to subpoena simply because they possessed some relevant information. No reason is seen for the exis-

²¹*Lloyd v. Hannibal & St. Joseph Ry.* (1873) 53 Mo. 509 (denying the power); *Shepard v. Mo. Pacific Ry. Co.* (1885) 85 Mo. 629; *Sidekum v. Wabash, St. Louis & Pacific Ry. Co.* (1887) 93 Mo. 400; *Owens v. Kansas City, St. Joseph & Council Bluffs R. R. Co.* (1888) 95 Mo. 169; *Fullerton v. Fordyce* (1893) Mo. 1; *Haynes v. Trenton* (1894) 123 Mo. 326; *Shome v. Lambert* (1909) 142 Mo. App. 567, 121 S. W. 799.

²²(1890) 141 U. S. 250.

²³*Alabama G. S. Ry. Co. v. Hill* (1890) 90 Ala. 71; *Johnston v. So. Pacific Ry. Co.* (1907) 150 Cal. 536; *Schroeder v. C. R. I. & P. Ry. Co.*

(1877) 47 Ia. 375; *Atchison T. & S. P. Ry. Co. v. Thul* (1883) 29 Kan. 333; *Miami & Montgomery Turnpike Co. v. Bailey* (1881) 37 Ohio St. 104, accord; *Parker v. Enslow* (1882) 102 Ill. 272; *Penn. Co. v. Newmeyer* (1891) 129 Ind. 401 (but see *Terre Haute & Ind. R.R. Co. v. Brunner* (1890) 128 Ind. 542); *Stock v. N. Y., N. H. & H. R. Co.* (1900) 177 Mass. 155; *McQuegan v. Delaware, N. & W. R. R. Co.* (1891) 129 N. Y. 50, contra.

²⁴*Haynes v. Trenton* (1894) 123 Mo. 326.

²⁵Wigmore, Evidence § 2194.

tence of a privilege by virtue of which a party might decline to furnish this particular kind of evidence.²⁶ He may rely upon the constitutional guaranty against unreasonable searches and seizures if the order in a particular case is arbitrary and unreasonable.

The objection has been urged that the court has no means of enforcing its order should the defendant fail to comply. But once the power of the court to make the order be conceded this objection vanishes, for disobedience to an order properly made by a court is contempt, and may be punished by fine or imprisonment.²⁷ In personal injury cases the courts have asserted their power to refuse to permit plaintiff to present his evidence, or their power to dismiss his suit.²⁸ A defendant who disobeys the order might be precluded from going on with his defense.

Since the law is well established in this state that the trial court may, in its discretion, order a party to submit to a physical examination, the result in the principal case, it is submitted as consistent with our present attitude toward litigation. But since the making of the orders in the physical examination cases is not based upon any relationship of master and servant, it would seem unnecessary to limit the power to make the order approved in *State v. Anderson* to cases where that relationship exists.

S. H. LIBERMAN

ESTATES—CONSTRUCTION OF DEEDS—"ASSIGNS" AS A WORD OF LIMITATION. *Tennison v. Walker*.¹—Land was conveyed by deed to A "and her bodily heirs and assigns," habendum to A "and unto their heirs and assigns forever," and the grantor covenanted to warrant and defend the title to A and "her heirs and assigns forever." A conveyed the land to B, and on A's death ejectment was brought by her bodily heirs who claimed under the deed as the owner of the statutory remainder created by the statute on estates tail. The Supreme Court reversed a judgment for the plaintiffs and held that A took a fee simple which she had conveyed to B.

While the result of this decision may be unobjectionable, certain features of the opinion of WOODSON, J., are very disappointing. First, a distinction was drawn between deeds of gift and deeds executed to purchasers. It seems unnecessary to clog our law of real property with any such distinction. The security of titles demands a large measure of certainty in the meaning of words used in a conveyance. Purchasers of land ought to be able to rely on the words used in deeds without too much variance according to the circumstances of each conveyance. It is difficult therefore to agree with Judge WOODSON's statement that "where the grantee purchases property and it is not a gift by the grantor, it will not be presumed the latter intended to make the same circum-

²⁶Wigmore, Evidence § 2221.

²⁷*Shroeder v. C. R. I. & P. Ry. Co.* (1877) 47 Ia. 375, 381.

²⁸*Miami & Montgomery Turnpike Co.*

v. Bailey (1881) 37 Ohio St. 104.

¹(1916) 190 S. W. 9.

scribed limitations against the former's right of alienating the property as if the property had been a gift by the grantor to the grantee." It is submitted that such a rule will only add to the existing uncertainty which necessitates the opinion of an appellate court on deeds which ought to be perfectly clear.

Second, the court relied upon the use of the word "assigns" in the granting clause, and held that on account of it the granting clause was "indefinite, uncertain and ambiguous." In the grant of a fee simple, which is frequently phrased to *A and his heirs and assigns*, one word *assigns* is a meaningless part of a formula. In feudal days it probably had some significance,³ but since all lands were made alienable by the statute of Quia Emptores, the phrase has performed no office whatever. Hence it was possible for Joshua Williams to say that the words "*and assigns forever*" had no conveyancing virtue at all; but were merely declaratory of that power of alienation which the purchaser would have possessed without them.⁴ In *Bean v. Kenmuir*⁵ the court refused to give to the word *assigns* the effect of adding a power of disposition. The same result was reached in *Chew v. Kellar*.⁶ The addition of the word *assigns* is purely formal, and it ought to be treated as quite as meaningless as the frequent expression *to their behoof*. It is unfortunate that in *Gannon v. Albright*⁷ and in *Gannon v. Pauk*⁸ the word *assigns* was emphasized; in both of those cases the court was dealing with a will, and even if the word is to be given some importance in wills, it deserves no importance in deeds where the formula is generally employed. Nor should the effect of the word *assigns* be different when it is added to words of limitation of a fee tail. In any case it is only formulary, and should for practical purposes be omitted. It seems unfortunate, therefore, that WOODSON, J., should have said in *Tennison v. Walker* that the use of the word *assigns*, "throws some doubt on the meaning of the words 'and her bodily heirs.'" This merely opens up another avenue for uncertainty in deeds, and gives another ground for litigation which ought to be avoided. No suggestion had been made in *Chew v. Kellar* that a conveyance to a grantee and "her bodily heirs and assigns" was rendered equivocal by the use of the words *assigns*. Careful conveyancers have in the past employed the word *assigns* in a purely formal way. In the future they should omit it altogether.

Third, in construing the deed in *Tennison v. Walker*, WOODSON, J., relied upon facts which tended to show that the grantee had acted as tho she believed that she had received a fee simple. The grantee had several times encumbered the land with deeds of trust, and had by her warranty deed attempted to "convey all of the title to the land." It is an alarm-

²Leake, *Real Property* (2d ed.) p. 23 n.; *Brookman v. Smith* (1871) L. R. 6 Ex. 291, 306.

³Williams, *Real Property* (22d ed.) p. 149, cited in *Brookman v. Smith* (1871) L. R. 6 Ex. 291, 306. See also Challis, *Real Property* (3d ed.) p. 221.

⁴(1885) 86 Mo. 666, 671. Cf. *David-*

son v. Manson (1898) 146 Mo. 608, 48 S. W. 635.

⁵(1902) 171 Mo. 215, 225, 71 S. W. 172.

⁶(1904) 183 Mo. 238, 249, 81 S. W. 1162.

⁷(1906) 200 Mo. 75, 88, 98 S. W. 471.

ing proposition that the construction of a deed should in any measure depend upon an act of the grantee after its execution where such act is in no sense an admission against interest. What more attractive temptation could be held out to dishonest persons who desire to enlarge their ownership! The question in the principal case was whether the grantee took a fee simple, or a life estate. To determine this question with any reference to the grantee's acts subsequent to the conveyance is to permit the grantee to lift herself by her own boot straps. Such a rule would necessitate lawyers' advising their clients to deal with property as tho they had full title, lest it be concluded from their actions that they have less than they are entitled to. If the court will permit grantees' actions to enlarge their rights, it may be incumbent upon grantees to so act lest their rights be diminished. In *Scott v. Scott*,^{*} the question was whether a deed had been delivered, and the conduct of the alleged grantee as well as that of the alleged grantor showed that neither understood that their prior acts amounted to a delivery. Such conduct in tantamount to an admission against interest and had some probative value. But this cannot be said of the grantee's conduct in *Tennison v. Walker*. The statute of frauds was enacted to insure that all efficacious parts of a conveyance would be contained in the writing itself. To permit the later acts of the grantee to enlarge the effect of words used in a deed is to jeopardize the position of every purchaser who relies on the record.

Has not the time come when the court should consider more carefully the social interest in the security of titles? That security demands certainty above all else. Land will become unsalable unless the courts stick strictly to rules of law which will enable lawyers to pass on titles readily. But if under the guise of effectuating what is thought to have been the probable intention of the parties the Supreme Court continues to enlarge the realm of loose construction, it will soon have become impossible for any lawyer to advise a client with reference to the validity of a title without having the Supreme Court itself declare what was the intention of the parties under all of the circumstances. It ought to be recognized that the task of ascertaining unexpressed intentions is usually guesswork. Formality in conveyances has its proper place, even in an age when informality is religion.

In the principal case, the difference between the granting clause on the one hand and the habendum and warranty clauses on the other hand, is a sufficient justification of the result which the court reached: for since the adoption of the rule that all parts of an instrument are to be considered in its construction, there is no reason for assigning arbitrary weight to either the granting or the habendum clause. In Lord Coke's day if the grant in the premises were to A and the heirs of his body, habendum to A and his heirs forever, A would have taken a fee

^{*}(1888) 95 Mo. 300, 81 S. W. 161. *Warne v. Sorge* (1914) 258 Mo. 162, Cf. *Blumenthal v. Blumenthal* (1913) 169, 167 S. W. 967. 251 Mo. 693, 706, 158 S. W. 648;

tail and a fee simple expectant.⁹ In *Corbin v. Healey*,¹⁰ it was held that A took a fee tail, and apparently a fee simple expectant thereon. But under the Missouri rule, the deed in *Tennison v. Walker*, taken as a whole may very properly be said to have indicated an intention to pass a fee simple. It is to be regretted that the court put reliance on such artificial rules in reaching this result.

MANLEY O. HUDSON.

LARCENY—CONSTRUCTIVE ASPORTATION—CONSENT OF OWNER. *State v. Loeb*.¹—Some person having access to the office of a manufacturing company prepared a false order for goods, to be shipped to his confederate. To this order he forged the initials of the sales manager and inserted it among the valid orders of the company, so that in the due course of business the order was filled by employees of the company who acted innocently. After the goods had been baled, billed, and labeled, the company discovered the fraud, but in order to apprehend the fraudulent consignee, permitted the shipment to be made. The defendants were accused of preparing the false order and were convicted of larceny but on appeal the Supreme Court found that there was not sufficient evidence to connect the defendants with the shipment. In considering whether the facts disclosed such a trespass as would constitute larceny, the court said that even "if it be conceded that the false billing and labeling of the goods have been sufficiently shown to constitute a constructive asportation, we find that the owner, upon discovery of this fraud, directed that the goods be shipped as labeled, thereby sanctioning the theretofore unlawful taking."

To constitute larceny there must be a taking and a carrying away of property² without the consent of the owner.³ The property must come into the possession of the taker, but such possession need be but for an instant,⁴ and the removal need extend no further than a mere change of place or position of the entire subject matter of the larceny.⁵ Thus it was held in *State v. Hecox*,⁶ that taking wheat from its place in the granary, placing it in sacks and tying the sacks constituted a sufficient asportation. The act of asportation may be accomplished by stratagem or fraud through the agency of an innocent party,⁷ and it is not essential that the property actually come into the hands of the thief.⁸ In

⁹Coke on Littleton, 21a.

¹⁰(1838) 20 Pickering 514.

¹(1916) 190 S. W. 299.

²2 Bishop, Crim. Law (8th ed.) § 794.

³2 Wharton, Crim. Law (11th ed.) § 1152; *State v. Hayes* (1891) 105 Mo. 76, 16 S. W. 514; *State v. Storts* (1897) 138 Mo. 127, 39 S. W. 843; *State v. Waller* (1903) 174 Mo. 518, 74 S. W. 842.

⁴*State v. Williams* (1906) 199 Mo. 137, 97 S. W. 562.

⁵*State v. Gasell* (1860) 30 Mo. 92 (leading a horse a short distance in owner's lot); *State v. Higgins* (1885) 88 Mo. 354 (money falling to floor when till was removed); *State v. Taylor* (1896) 136 Mo. 66, 67, 67 S. W. 907, 620.

⁶*Rex v. Pitman* (1826) 2 Car. & P. 423; *State v. Hunt* (1877) 45 Iowa 673; *Cummings v. Commonwealth* (1883) 5 Ky. L. Rep 200; *Smith v. State* (1912) 74 S. E. 1093 (Ga.).

Commonwealth v. Barry,⁹ the defendant changed a check upon a trunk which stood in the baggage room of a depot so that it was transported by the railroad company to an accomplice of the defendant. This was held equivalent to a taking and carrying away by the defendant. In the principal case, the boxing up of the goods sufficient to satisfy the requirement of a taking and a carrying away, and would constitute larceny unless the owner's consent nullified the crime.¹⁰

No cases have been found which decide whether or not a voluntary handing over of property by the owner, who has regained possession of it after there has been a complete asportation without his consent, will operate so as to make the taking lawful *ab initio*, or to prevent a "therefore unlawful taking" from being larceny.¹¹ A consideration of the doctrine of consent in criminal law, however, leads to the conclusion that this position is untenable. The consent of an individual may prevent certain acts from being crimes, as in *State v. Waghalter*,¹² where, in pursuance of a plan of a railroad company to entrap one suspected of receiving goods stolen from the company, an agent of the company, took a box of goods from the company and delivered it to the defendant with its consent, it was held that there was no larceny because the owner had consented to the asportation. But if an individual once does an act which the law forbids, a later consent or condonation by the person injured can have no effect upon the criminal liability of the offender.¹³ In *State v. Welch*,¹⁴ it was held that when the offence of rape is complete by penetration no subsequent consent by the woman will avail the party who committed the crime. A complete crime is an injury to the public, to be redressed as such, and if all the elements of a crime are present the demands of public interest cannot be affected by the consent of any individual.¹⁵

In the principal case, if no larceny had been committed up to the time the goods were shipped, the voluntary delivery over of the property by the owner was a consent to the taking which would operate to prevent what otherwise would have been larceny.¹⁶ But if there had been a complete asportation prior to this time, it is difficult to substantiate the view that the subsequent regaining of possession and voluntary delivery over of the goods operates to nullify a crime already committed. The quotation from the opinion of the court seems to indicate that the

⁹(1898) 125 Mass. 390.

¹⁰*State v. Chambers* (1883) 22 W. Va. 779; *Harrison v. People* (1872) 50 N. Y. 518; *Adams v. Commonwealth* (1913) 153 Ky. 88.

¹¹In *State v. Waghalter* (1903) 177 Mo. 676, 76 S. W. 1028, cited by the court in the principal case, the consent was given prior to the asportation.

¹²(1903) 177 Mo. 676. 76 S. W. 1028.

¹³*Flechner v. State* (1893) 58 Ark. 98; *State v. Tull* (1893) 119 Mo. 421, 24 S.

W. 1010; *Truslow v. State* (1895) 95 Tenn. 189; *Thalheim v. State* (1896) 38 Fla. 169; *Williams v. State* (1898) 105 Ga. 606; *State v. Merkel* (1905) 189 Mo. 315, 87 S. W. 1186.

¹⁴(1905) 191 Mo. 189, 89 S. W. 945. See the note to *Smith v. State* (1861) 12 Ohio St. 466, in 80 Amer. Dec. 367.

¹⁵See Consent in Criminal Law, 8 Harv. Law Rev. 323.

¹⁶*Topolewski v. State* (1906) 130 Wis. 244, 7 L. R. A. (N. S.) 756.

court neglected this sequence in reaching its conclusion, and the contrary result may well have been made to depend on the precise time of completion of the asportation.

J. C. BOUR.

MASTER AND SERVANT—LIABILITY OF RAILROAD FOR ACT OF TICKET AGENT—FALSE IMPRISONMENT. *Sacks v. St. Louis & San Francisco R. R. Co.*¹—A ticket agent employed by a railroad company sold the plaintiff a ticket, receiving in payment a bill of somewhat unusual appearance. The plaintiff returned to his hotel where he was shortly afterwards visited by the ticket agent accompanied by two policemen. The agent said something to the officers, then alone approached the plaintiff and accused him of having given a counterfeit bill. The plaintiff asserted his innocence but gave the agent another bill in exchange for the one said to have been counterfeit. The agent returned to the officers, talked with them for a short time, and then left. The officers then charged the plaintiff with having passed counterfeit money and placed him under arrest. The plaintiff was later discharged when the bill was found to be genuine. He then brought suit against the railroad company for false imprisonment. The Supreme Court held that the defendant was not liable on the ground that since the money had been returned before the arrest, the company's interest in the matter had ceased and the agent was acting without the scope of his authority after that time.

Where no agency is involved, it is not necessary, for liability for false imprisonment to attach, that the defendant have *requested* the officer to arrest the plaintiff. It is sufficient that the defendant by his advice, suggestion or groundless information was the moving cause of the arrest.² Thus in *Schmidt v. New Orleans R. R. Co.*,³ a street car conductor stated to an officer, "There is a pickpocket on the car", and pointed out the suspect. The arrest by the policeman was held to be the natural consequence of the conductor's acts. And it was held in *Bright v. Patton*⁴ that if the wrongful arrest was made at the instance, suggestion or request of the defendant, or if he counseled, advised or encouraged the arrest he would be liable for the false imprisonment. In *Warner v. Riddiford*,⁵ the defendant went to the plaintiff's house to collect some money, taking with him two police officers. He demanded the money in their presence and the plaintiff, believing he was entitled to more time, refused payment. The defendant did not direct the officers to take the plaintiff into custody, but it was held that the defendant's conduct in bringing officers and making the demands in their presence

¹(1917) 192 S. W. 418.

²*Monson v. Rouse* (1900) 86 Mo. App. 97; *McMorris v. Howell* (1903) 89 App. Div. 272 (N. Y.); *McAleer v. Good* (1907) 216 Pa. 473; *Tenney v. Harney* (1891) 63 Vt. 520.

³(1906) 40 S. 714, 7 L. R. A. (N. S.) 162 (La.).

⁴(1887) 5 Mackey (D. C.) 534.

⁵4 C. B. N. S. 180, 202.

was such as to make the defendant the moving cause of the arrest. In these cases the defendant's actual participation in the arrest ceased when the complaint had been registered and before the actual imprisonment was effected. But the defendant had set the forces of the law in motion and was held liable for the ensuing arrest upon the ground that the imprisonment was the natural consequence of his acts. And, upon the same principle, it is recognized that a defendant may be liable though he is not actually present at the time the arrest is made. In *Floyd v. State*,⁶ where the defendant caused a false process to be issued against the plaintiff, the court said: "It is true the defendant was not actually present when the arrest was made, yet as he first put the law in motion and was mainly instrumental in causing the act to be done, we consider him legally liable for the consequences."

The liability of a railroad company for the acts of its servants depends, of course, upon whether the acts relied upon were done in the course of the servant's employment. And what this course of employment is may be implied from the relationship or from the duties expressly devolving upon the servant,⁷ as where one employed by a railroad company to watch for trespassers, while keeping watch shoots an innocent individual, the company is liable.⁸ So if a false arrest is procured by the servant acting in the course of his employment, the railroad is liable.⁹ In *Lynch v. Metropolitan Elevator Rd. Co.*¹⁰ a railroad company was held liable where a gatekeeper, who had been instructed to allow no one without a ticket to pass through a certain gate, arrested a passenger who had lost his ticket. And in *Goff v. Great Northern Ry. Co.*,¹¹ an agent had the plaintiff arrested for failure to pay fare in accordance with a railroad act and although the agent had no express authority to cause an arrest, the company was held liable. The companies must expect that some exigencies will naturally arise which demand prompt decision and action on the part of its representatives, and it must be inferred that authority has been given their ticket agents to make or authorize arrests in certain exigencies, which often arise. There is always implied authority to protect or recover railroad property, and arrests made for the accomplishment of these purposes are within the scope of

⁶(1851) 12 Ark. 43, 49.

⁷*Robinson & Co. v. Green* (1906) 148 Ala. 434.

⁸*Hachl v. Wabash R. R. Co.* (1893) 119 Mo. 325, 24 S. W. 737; *Meade v. C., R. I., & P. R. Co.* (1896) 68 Mo. App. 92; *American Express Co. v. Paterson* (1881) 73 Ind. 430; *Evansville & Terre Haute R. Co. v. McKee* (1884) 99 Ind. 519.

⁹*Wheeler Mfg. Co. v. Boyce* (1887) 36 Kans. 350; *Shea v. Manhattan Rd.*

Co. (1889) 7 N. Y. Supp. 497; *Galveston, etc. R. C. v. Donahue* (1882) 56 Tex. 162. Story, Agency (9th ed.) § 452; Cooley, Torts (3rd ed.) p. 319.

¹⁰(1882) 90 N. Y. 77. But if the individual has already passed through the gate he is no longer a passenger and the railroad company is not liable for the arrest. *Corwin v. Long Island R. Co.* (1885) 2 N. Y. City Ct. 106.

¹¹(1861) 3 El. & El. 672.

the agent's authority.¹³ In *Palmeri v. Manhattan Rd. Co.*,¹⁴ the ticket agent received a coin from the plaintiff, and later believing it counterfeit, he followed the plaintiff to the platform, demanded other money of her, and detained her for a time. It was held that the railroad company was liable because the agent was acting for his employer in an endeavor to recover its property. On the other hand, in *Mulligan v. N. Y. Rd.*,¹⁵ where the agent accepted the money believing it was counterfeit, but accepted it for the purpose of ensnaring the plaintiff, the arrest was not for the protection of the defendant's property.

It is this distinction upon which the court relied in *Sacks v. St. Louis & San Francisco R. R. Co.*, where the court concluded that the company could not be liable for an arrest accomplished after its interest had ceased. But it is submitted that if the arrest was instigated during the period of the defendant's interest, the company should be held liable regardless of the defendant's interest at the time of the resulting imprisonment. Since one is liable for any false imprisonment procured by his agent while his interest continues, and since the agent's participation in the arrest may consist only in instigating the arrest, it would seem that the defendant is liable for a false imprisonment *instigated* by his agent during the continuance of the defendant's interest. Whether the arrest caused by the agent occurred after the company's interest had ceased is immaterial. In fixing liability the important element should be the interest of the defendant at the time of the original instigation of the arrest rather than at the time of the arrest itself, and the principal case should have turned upon the time at which the defendant's agent set in motion the forces of the law which resulted in the arrest of the plaintiff. If he set these forces in motion after the money had been returned, and the company's interest had accordingly ceased, the company should not be held. If, however, the proximate cause of the arrest was conduct or communications of the agent to or in the presence of the officers at any time prior to the recovery of the money or while securing the return of the money, then the company should be liable, as the arrest was caused by the agent while acting in the course of employment.

In the principal case, the time at which the agent started the process of causation which resulted in the arrest is not clear. It is not shown what the agent told the officers when he took them to the plaintiff's hotel or when he left them just before he approached the plaintiff, but he probably expressed a belief in the plaintiff's guilt, and in the process of recovering the money he formally accused the plaintiff within the hearing of the officers whom he had brought there. In the light of these facts, it is reasonable to suppose that he was setting in motion the forces of the law as truly as though he had said, "Officer, there is a counterfeiter!" The precise time at which the agent set these forces in

¹³*Palmeri v. Manhattan R. Co.* (1892) 133 N. Y. 261; *Cameron v. Pacific Exp. Co.* (1892) 48 Mo. App. 99; *Davis v. C., R. I., & P. R. Co.* (1916) 192 Mo. App.

419, 182 S. W. 826. *Wood, Law of Master and Servant*, (2nd ed.) § 307.

¹⁴(1892) 133 N. Y. 261.

¹⁵(1892) 129 N. Y. 506.

motion is a question of fact, and it is submitted that to have arrived at a proper solution of the case the court should have addressed itself to the alternative possibilities involved.

P. G. KOONTZ.

PUBLIC SERVICE COMPANIES—MUNICIPAL CORPORATIONS—PRIVATE CONTRACT CONFLICTING WITH PUBLIC SERVICE DUTY. *State ex rel. St. Joseph Water Co. v. Eastin*.¹—A public service company, the St. Joseph Water Co., constructed at considerable expense a private water main to a State hospital, then a short distance outside the city limits, and contracted to furnish the hospital with water through this new pipe and another already in service, for ten years at ten cents a thousand gallons. The rate for similar service within the city was fixed by the franchise of the company at six cents a thousand gallons. Before the expiration of the period fixed by the contract, the limits of the City of St. Joseph were extended so as to include the hospital grounds, and other consumers in the annexed district were supplied with water from the old main, apparently at six cents a thousand gallons. The managers of the hospital refused to pay more than the six-cent rate and the water company instituted mandamus proceedings to compel payment of the balance alleged to be due under the contract. The Supreme Court held that the contract had not been abrogated by the extension of the limits of the city, and that the hospital must pay the contract rate instead of the lower rate fixed by the charter of the company for consumers within the city limits. That part of the decision of *State ex rel. St. Joseph Water Co. v. Geiger*² relating to this point is expressly overruled by this decision.

The court admitted that as a general principle "in all ordinary matters and things the ordinances of an annexing town or city at once and automatically extend to and over the annexed territory",³ but drew a distinction between the situation in which an incorporated municipality is annexed and a franchise agreement exists between the company and the municipal corporation, and the situation in which the territory so annexed is unincorporated and there exists a series of contracts between the company and private consumers. As to cases of the first type in which the territory annexed is incorporated and the public utility has "franchise contracts" as to rates in both the annexing and annexed municipality, the court said "there existed the power to regulate public service rates as to each of such existing contracts in both the annexed and annexing municipality. So, the franchise contracts in each municipality, having been made with imputed reference to the power in each municipality to regulate rates, it follows that no very serious objection could be urged against applying the rate of the annexing rather than that of the annexed municipality." As illustrative of this first class, the court

¹(1917) 192 S. W. 1006.

³*St. Louis Gaslight Co. v. St. Louis*

²(1912) 246 Mo. 74, 154 S. W. 486. (1870) 46 Mo. 121.

Commented upon in 1 Law Series, Missouri Bulletin, p. 39.

cited several cases in which water,⁴ street-railway,⁵ railroad,⁶ telephone,⁷ etc., rates in force in the annexing territory were held to apply to the annexed territory notwithstanding franchise contracts permitting higher rates in the territory annexed. In distinguishing the situation of the second type—the court was of the opinion that there could be only private contracts for service, each of which would be made for a valuable consideration with a private consumer, who would not have reserved to himself any right of regulation within the contract period, and who would have in his favor no statute retaining for him any power of rate regulation. This distinction is drawn, of course, not between incorporated municipalities and unincorporated territory as such, but between the type of agreement generally entered into by a public service company with an incorporated municipality and the type of agreement generally entered into by such a company with private individuals living in any unincorporated territory.

Denver v. Denver Union Water Co.,⁸ cited in support of this distinction does not seem to bear out the contention of the court, for in that case it seems that the territory annexed consisted of "independent towns or cities" with each of which the water company had franchise contracts, and not, as appears in the syllabus, unincorporated territory in which the company had "private" contracts with individual consumers. So, while this decision is *contra* to those cited by the court, in holding that the rates of the annexing city will not apply so as to nullify pre-existing franchise contracts for service in the annexed territory, nevertheless it does not seem to support the court's contention for a different rule where unincorporated territory is annexed from that where incorporated territory is annexed.

On the other hand, there is at least one case directly opposed to the proposition that in the absence of a reservation of a right of regulation or a statute retaining to such consumer that power consumers outside of the municipality granting the franchise have no right to a reasonable rate, if the water company chooses to go without the confines of the city to serve them. In *Brown v. Lawrence County Water Co.*,⁹ it was held to be "the duty to the state, a part of whose functions these [public service companies] are incorporated to perform, not to discriminate unjustly against citizens of the state whether within or without the municipal limits." In that case it was directed that the rates for private consumers in the vicinity and for the inhabitants of an unincorporated village, which could not grant a franchise, be lowered to a point equal to those in effect in the municipality granting the franchise to the public service company.

⁴*Des Moines v. Des Moines Water-works Co.* (1895) 95 Iowa 348.

⁵*Peterson v. Tacoma R. & P. Co.* (1910) 60 Wash. 406.

⁶*Indiana R. Co. v. Hoffman* (1903) 161 Ind. 593.

⁷*People v. Chicago Telephone Co.* (1905) 220 Ill. 238.

⁸(1907) 41 Colo. 77.

⁹(1914) 1 Mo. P. C. R. 355.

As an element of injustice to the water company should the franchise rate be enforced the court mentioned this: the contract between the water company and the city provided that for each five hundred feet of main laid as directed by the city, apart from any private contract, the company should install a fire hydrant for which the city would pay an annual rental, and, that therefore it would be unfair in that the expenses of the new pipe line to the hospital would be offset by neither contract rate from the hospital nor hydrant rentals from the city. However, even under the doctrine laid down by the court to the effect that the ordinance changing the city limits would not be wholly void but would be inoperative in so far as it abrogated the existing contract with the hospital, there is nothing, apparently, to prevent the installation of fire hydrants which would yield an annual rental, since the installation of such would not abrogate the contract with the hospital to furnish a supply of water at a given rate. Certainly they could be installed and thus bring in rentals were the contract with the hospital to be entirely abrogated.

Under the rule applied in the instant case to a situation where unincorporated territory is brought within the city limits, other private consumers in relatively the same position as the hospital, but who happened to have made no contracts, were entitled to receive, at a rate forty per cent lower, substantially the same service as the hospital. Obviously this is in conflict with the generally recognized principle that forbids discrimination between applicants who ask substantially the same service.¹⁰ In this situation the only party to object would be the one paying the higher contract rate but we have only to reverse the facts, in which case the reasoning of the court would still apply unconditionally, to see the interest of the entire community in the matter. Had there been a binding contract to supply water to the hospital at, say, three cents a thousand gallons, after annexation, everyone within the scope of the public duty of the company could have complained of the discrimination. Nor could the existence of a private contract between the company and the hospital to serve it at a rate lower than that charged the general public for the same service, justify the discrimination.¹¹

The question arises whether a lowering of the rate in the case under consideration would unconstitutionally impair the obligation of the contract for a higher rate. The cases are numerous and authoritative to the effect that private contracts entered into between a public service company and a private individual are made subject to the power possessed by the proper authority to modify rates, and that, by private contracts for higher rates, such a public servant can neither deprive such proper authority of its regulatory police powers, nor relieve itself of the

¹⁰1 Wyman, *Public Service Corporations* § 1290.

¹¹*Armour Packing Co. v. U. S.* (1908) 209 U. S. 56.

public service duty it owes." This was intimated by the Supreme Court when it said, "We are not called on to consider whether a private contract for supplying water for ten years to a private consumer residing a mile from the company's mains, wherein connection was made at an expense to the water company of more than \$12,000, at ten cents per 1,000 gallons, was or was not so unreasonable as to have warranted a reduction upon proper and timely application therefor." In so far as this *dictum* implies that upon proper application therefor, an unreasonable rate would be lowered, regardless of contract, to a point of reasonableness, the foundation of the distinction between cases of franchise contracts and private contracts seems to be undermined by the very court which sets it up.

The argument in the dissenting opinion seems to be, that, since the existence of both a legal and a contractual duty on the part of the company would be anomalous, there exists but the legal or public service duty, and the rate to be paid for water should be the legal, not the contractual rate. This reasoning assumes the conclusion reached, namely, the invalidity of the contractual relationship after the extension of the city limits. But the results of the dissenting opinion seems to conform with prevailing authority, and is in consonance with the present day economic interpretation put upon the subject by the Missouri Public Service Commission.

G. K. TEASDALE

¹²*S. W. Telegraph & Telephone Co. v. Dallas* (1911) 104 Tex. 114 (reversed on other grounds); *Union Dry Goods Co. v. Georgia Public Service Corporation* (1914) 142 Ga. 841; *Pinney and*

Boyle Co. v. Los Angeles Gas & Electric Co. (1914) 168 Cal. 12; *New Orleans v. New Orleans Water Co.* (1891) 142 U. S. 79; *Knoxville Water Co. v. Knoxville* (1903) 189 U. S. 434.

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